Supreme Court of the United States

OCTOBER TERM, 1968

No. 1192

JOHN HENRY COLEMAN and OTIS STEPHENS,
Petitioners,

—VS.—

ALABAMA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

INDEX

IN THE CIRCUIT COURT
TENTH JUDICIAL CIRCUIT OF ALABAMA
JEFFERSON COUNTY
DIVISION NO. 6

13635

THE STATE

v.

JOHN HENRY COLEMAN

INDICTMENT—Filed November 11, 1966 A. I. M.

* * * *

The Grand Jury of said county charge that, before the finding of this indictment, JOHN HENRY COLEMAN unlawfully, and with malice aforethought, did assault Casey Frank Reynolds with the intent to murder him, against the peace and dignity of the State of Alabama.

EARL C. MORGAN (sig)
District Attorney
Tenth Judicial Circuit of Alabama

A TRUE BILL, Leonard C. Hughey, Foreman of the Grand Jury Presented to the presiding Judge in open court by the foreman of the Grand Jury, in the presence of 17 Grand Jurors and filed in open court by order of the Court on this the 11 day of Nov. 1966. Julian Swift, Clerk.

BAIL FIXED AT Ten Thousand Dollars. Gibson, Judge.

I hereby certify that a true copy of this indictment has been served on the defendant herein this the 1 day of Dec. 1966.

MELVIN BAILEY, Sheriff. By G. W. Cain, Deputy Sheriff.

IN THE CIRCUIT COURT
TENTH JUDICIAL CIRCUIT OF ALABAMA
JEFFERSON COUNTY

THE STATE

vs.

JOHN HENRY COLEMAN

JUDGEMENT ENTRY # 13635—May 2, 1967

Indictment for Assault With Intent to Murder

Honorable Wallace Gibson, Judge Presiding

This the 2nd day of May, 1967, came Earl C. Morgan, District Attorney, who prosecutes for the State of Alabama, and also came the defendant in his own proper person and by attorneys, William Wayne Smith and Charles Tarter, and the defendant having been duly arraigned upon the indictment in this cause, for his plea thereto says that he is not guilty and issue being joined on said plea, thereupon came a jury of good and lawful men, to-wit: Paul Berthon and eleven others, who being duly empaneled and sworn according to Law, before whom the trial of this cause was entered upon and continued from day to day and time to time, said defendant being in open Court at each and every stage and during all the proceedings in this cause; and on this the 3rd day of May, 1967, said jurors upon their oaths do say "We the jury find the defendant, John Henry Coleman, guilty of Assault with intent to murder as charged in the indictment." A request being made by the defendant, through his attorney, that the jury be polled, thereupon the Court asked each juror individually "Is this your verdict?" and each replied "It is".

The said defendant being now in open Court, and being asked by the Court if he had anything to say why the judgment of the Court and sentence of the Law should not now be pronounced upon him, says "No Sir". It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty of assault with intent to murder, as charged in said indictment, in accordance with the verdict of the jury in this cause, and it is the judgment of the Court and sentence of the Law that the defendant, the said John Henry Coleman, be imprisoned in the Penitentiary of the State of Alabama for a term of twenty (20) years.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended, including the costs of feeding the defendant while in jail.

This the 3rd day of May, 1967, Notice of Appeal being given and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $20,000.00, conditioned as required by Law.

This the 10th day of May, 1967, it appearing to the Court that defendant is without counsel and unable to employ counsel, it is ordered by the Court that Charles Tarter be and he is hereby appointed to represent the defendant on the appeal in this case.

The Court finds that the appellant is indigent within the meaning of the statutes, and hereby directs the Court Reporter to prepare and file with the Clerk a transcript without costs to the appellant, as provided by statute.

IN THE CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT OF ALABAMA
CRIMINAL DIVISION

Case No. 55563

STATE OF ALABAMA, PLAINTIFF

vs.

JOHN COLEMAN, DEFENDANT

AFFIDAVIT OF ATTORNEY OF RECORD—
Filed January 30, 1967

William Wayne Smith, being duly sworn, deposes and says:

That upon information and belief, and being so informed he does believe, that John Coleman is the defendant in the above styled cause and was residing in Jefferson County, Alabama, on or about the 29th day of September, 1966. He respectfully makes the within motion so that certain statements, confessions, inculpatory statements, exculpatory statements, statements against interest and/or involuntary appearances before any line-up before alleged witnesses, which were alleged to have been made or done by the defendant, on, to-wit: the 29th day of September, 1966, be declared illegal, unlawful, void and in violation of the said defendant's constitutional rights and that the District Attorney of the Tenth Judicial Circuit Court of Alabama be precluded from using said aforementioned statements or involuntary appearances before any line-up against the said John Coleman. That on, to-wit: the 29th day of September, 1966, prior to John Coleman having been charged with any offenses or being advised that he was under arrest for any offense or charged with any violation of the laws or statutes of the State of Alabama, he was in fact, detained and held in custody by Officers C. R. Boyd and E. K. Allen of the Police Department of Birmingham, Alabama and Deputies

J. L. Fordham and Dan Jordan of the Sheriff's Department of Jefferson County, Alabama in the absence of a warrant or any other formal pleading and without probable cause to believe that said defendants had committed a crime or violated any law. Both during and after the Defendant's liberty was restrained but before any alleged statements or involuntary appearances were made, the defendant was not effectively informed of his constitutional right to remain silent or warned that anything he might say might be used against him, or advised that he had a right to the advice and assistance of counsel before making any statements in a line-up or otherwise, or that if he did wish to make a statement, he had the right to the presence of counsel during the making of that statement; and further that he was not advised that he did not have to make an appearance in a line-up at police headquarters if he did not want to or that he did not have to make any statements whatsoever in a line-up, or that if he did it could be used against him or that he had a right to the assistance of counsel in making such a decision or that he had a right to the presence of counsel at the time of such appearance. All of which was to the detriment of the defendant and in violation of the 5th, 6th and 14th Amendments to the Constitution of the United States of America as made obligatory upon the several states by the 14th Amendment to the Constitution of the United States and of the Constitution of the State of Alabama, in the retention or use thereof of either said statement, confessions, inculpatory statements, exculpatory statements, statements against interest and statements of the alleged witnesses made while the defendant was involuntarily appearring in any line-up and statements subsequent thereto and relating to said time and appearance. All of which infringed upon the rights granted to him and guaranteed to him by the Constitutions of both the United States and the State of Alabama. Wherefor your deponent respectfully believes that under the above premises an order should be issued declaring void, illegal and unconstitutional any statements, confessions, inculpatory statements, exculpatory statements, statements against interest and statements made by alleged

witnesses both during and subsequent to an involuntary appearance in a line-up at police headquarters by the defendant, on, to-wit: The 29th day of September, 1966, and precluding the District Attorney from using the aforesaid statements and any evidence obtained against interest in the trial of this cause. Your deponent further avers that no previous application has heretofore been made to any other court relative to the material contained herein.

WILLIAM WAYNE SMITH (sig)
WILLIAM WAYNE SMITH

STATE OF ALABAMA)
JEFFERSON COUNTY)

William Wayne Smith, being duly sworn, deposes and says:

That he is one of the attorneys for the defendant in the above styled cause and he solemnly swears that the statements contained in the foregoing statement are true information and belief.

WILLIAM WAYNE SMITH (sig)
WILLIAM WAYNE SMITH

Sworn to and subscribed before
me, this 30 day of January, 1967.

DORIS J. WILLIS (sig) (SEAL)

Notary Public

IN THE CIRCUIT COURT FOR THE TENTH JUDICIAL CIRCUIT OF ALABAMA CRIMINAL DIVISION

Case No. 55563

STATE OF ALABAMA, PLAINTIFF

vs.

JOHN COLEMAN, DEFENDANT

MOTION TO SUPPRESS AND RULING THEREON

TO THE HONORABLE JUDGES OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA, CRIMINAL DIVISION:

Comes now John Coleman, by and through his attorney and hereby moves this court to direct that any confession, statements against interest, inculpatory statements, exculpatory statements, or statements made by him on or about the 29th day of September, 1966, and further any statements or any evidence or discovery whatsoever obtained by the District Attorneys of the 10th Judicial Circuit of Alabama on the preliminary hearing held on, to-wit: the 14th day of October, 1966, and further any statements relating to any identification of the defendant while in the custody of the hereinafter mentioned officers, to-wit: C. R. Boyd, W. T. Hart, Dan Jordan, and J. F. Fordham, or during any line-up, be suppressed in that (1) he was being held in custody or put in a line-up without a warrant, any formal pleading or without probable cause to believe that he had committed a felony; (2) he was not effectively informed of his constitutional rights to remain silent, warned that anything he might say could be used against him, that he had a right to counsel before making any statement in any line-up or in any other manner and that if he did wish to make a statement he had a right to have counsel present at the time of making of any such statement and was told if he would make a statement it would be better for him; (3) he was not

informed that he did not have to appear in a line-up without having first the opportunity of having been advised by an attorney, nor was he advised that he had the right to assistance of counsel before appearing in a line-up and was not informed that if he did appear in the line-up and an identification was made, that it could be used against him; (4) he was not appointed counsel to represent him at the prelimenary hearing which is a critical stage of the criminal proceedure in Alabama; all to his detriment and in violation of his constitutional right under the Constitution of the United States of America and of the State of Alabama.

WILLIAM WAYNE SMITH (sig)
WILLIAM WAYNE SMITH
Attorney for Defendant

2-24-67

The State having confessed that portion of the Motion pertaining to the confession of Movant made to police officers at City Jail, said Motion is hereby granted as to said confession and said confession, is hereby suppressed; Motion to Suppress evidence is hereby overruled in all other aspects. Gibson, J.

Filed in Office, Jan. 30, 1967, Julian Swift, Clerk

IN THE CIRCUIT COURT
TENTH JUDICIAL CIRCUIT OF ALABAMA
JEFFERSON COUNTY

13635

THE STATE

v.

OTIS STEPHENS

INDICTMENT—Filed November 11, 1966 # 13657 A. I. M.

* * * *

The Grand Jury of said county charge that, before the finding of this indictment, OTIS STEPHENS unlawfully, and with malice aforethought, did assault Casey Frank Reynolds with the intent to murder him, against the peace and dignity of the State of Alabama.

EARL C. MORGAN (sig)
District Attorney
Tenth Judicial Circuit of Alabama

A TRUE BILL, Leonard C. Hughey, Foreman of the Grand Jury Presented to the presiding Judge in open court by the foreman of the Grand Jury, in the presence of 17 Grand Jurors and filed in open court by order of the Court on this the 11 day of Nov. 1966. Julian Swift (sig) Clerk.

BAIL FIXED AT Ten Thousand Dollars. Gibson (sig) Judge.

MELVIN BAILEY, Sheriff. By J. Baucom, Deputy Sheriff.

IN THE CIRCUIT COURT
TENTH JUDICIAL CIRCUIT OF ALABAMA
JEFFERSON COUNTY

THE STATE

vs.

OTIS STEPHENS

JUDGMENT ENTRY # 13657—May 2, 1967

Indictment for Assault With Intent to Murder

Honorable Wallace Gibson, Judge Presiding

This the 2nd day of May, 1967, came Earl C. Morgan, District Attorney, who prosecutes for the State of Alabama, and also came the defendant in his own proper person and by attorneys, Charles Tarter and William W. Smith, and the defendant having been duly arraigned upon the indictment in this cause, for his plea thereto says that he is not guilty and issue being joined on said plea, thereupon came a jury of good and lawful men, to-wit: Paul Berthon and eleven others, who being duly empaneled and sworn according to Law, before whom the trial of this cause was entered upon and continued from day to day and time to time, said defendant being in open Court at each and every stage and during all the proceedings in this cause; and on this the 3rd day of May, 1967, said jurors upon their oaths do say "We the jury find the defendant, Otis Stephens, guilty of assault with intent to murder as charged in the indictment." A request being made by the defendant, through his attorney, that the jury be polled, thereupon the Court asked each juror individually "Is this your verdict?" and each replied "It is."

The said defendant being now in open Court, and being asked by the Court if he had anything to say why the judgment of the Court and sentence of the Law should not now be pronounced upon him, says "No Sir I don't have anything to say." It is therefore considered by the Court, and it is the judgment of the Court that said de-

fendant is guilty of assault with intent to murder, as charged in said indictment, in accordance with the verdict of the jury in this cause, and it is the judgment of the Court and sentence of the Law that the defendant, the said Otis Stephens, be imprisoned in the Penitentiary of the State of Alabama for a term of twenty (20) years.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended, including the costs of feeding the defendant while in jail.

This the 3rd day of May, 1967, Notice of Appeal being given and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $20,000.00, conditioned as required by Law.

This the 10th day of May, 1967, it appearing to the Court that defendant is without counsel and unable to employ counsel, it is ordered by the Court that Charles Tarter be and he is hereby appointed to represent the defendant on the appeal in this case.

The Court finds that the appellant is indigent within the meaning of the statutes, and hereby directs the Court Reporter to prepare and file with the Clerk a transcript without costs to the appellant, as provided by statute.

IN THE CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT OF ALABAMA
CRIMINAL DIVISION

Case No. 55605

STATE OF ALABAMA, PLAINTIFF

vs.

OTIS STEPHENS, DEFENDANT

AFFIDAVIT OF ATTORNEY OF RECORD—
Filed January 30, 1967

Charles A. Tarter, being duly sworn, deposes and says:

That upon information and belief, and being so informed he does believe, that Otis Stephens is the defendant in the above styled cause and was residing in Jefferson County, Alabama, on or about the 29th day of September, 1966. He respectfully makes the within motion so that certain statements, confessions, inculpatory statements, exculpatory statements, statements against interest and/or involuntary appearances before any line-up before alleged witnesses, which were alleged to have been made or done by the defendant, on, to-wit: the 29th day of September, 1966, be declared illegal, unlawful, void and in violation of the said defendant's constitutional rights and that the District Attorney of the Tenth Judicial Circuit Court of Alabama be precluded from using said aforementioned statements or involuntary appearances before any line-up against the said Otis Stephens. That on, to-wit: the 29th day of September, 1966, prior to Otis Stephens having been charged with any offense or being advised that he was under arrest for any offense or charge with any violation of the laws or statutes of the State of Alabama, he was in fact, detained and held in custody by officers C. R. Boyd and E. K. Allen of the police department of Birmingham, Alabama and Deputies J. L. Fordham and Dan Jordan of the Sheriff's Department of Jefferson County, Alabama in the absence of a warrant or any other formal pleading and without prob-

able cause to believe that said defendants had committed a crime or violated any law. Both during and after the Defendant's liberty was restrained but before any alleged statements or involuntary appearances were made, the defendant was not effectively informed of his constitutional right to remain silent or warned that anything he might say might be used against him, or advised that he had a right to the advice and assistance of counsel before making any statements in a line-up otherwise, or that if he did wish to make a statement he had the right to the presence of counsel during the making of that statement; and further that he was not advised that he did not have to make an appearance in a line-up at police headquarters if he did not want to or that he did not have to make any statements whatsoever in a line-up, or that if he did it could be used against him or that he had a right to the assistance of counsel in making such a decision or that he had a right to the presence of counsel at the time of such appearance. All of which was to the detriment of the defendant and in violation of the 5th, 6th and 14th Amendments to the Constitution of the United States of America as made obligatory upon the several states by the 14th Amendment to the Constitution of the United States and of the Constitution of the State of Alabama, in the retention or use thereof of either said statements, confessions, inculpatory statements, statements against interest and statements of the alleged witnesses made while the defendant was involuntarily appearing in any line-up and statements subsequent thereto and relating to said time and appearance. All of which infringed upon the rights granted to him and guaranteed to him by the Constitutions of both the United States and the State of Alabama. Wherefor you deponent respectfully believes that under the above premises an order should be issued declaring void, illegal and unconstitutional any statements, confessions, inculpatory statements, exculpatory statements, statements against interest and statements made by alleged witnesses both during and subsequent to an involuntary appearance in a lineup at the police headquarters by the defendant, on, to-wit: the 29th day of September, 1966, and precluding the District

Attorney from using the aforesaid statements and any evidence obtained against interest in the trial of this cause. Your deponent further avers that no previous application has heretofore been made to any other court relative to the material contained herein.

CHARLES A. TARTER (sig)
CHARLES A. TARTER

STATE OF ALABAMA)
JEFFERSON COUNTY)

Charles Tarter, being duly sworn, deposes and says:

That he is one of the attorneys for the defendant in the above styled cause and he solemnly swears that the statements contained in the foregoing statement are true information and belief.

CHARLES A. TARTER (sig)
CHARLES A. TARTER

Sworn to and subscribed before me, this 27 day of January, 1967.

DAVID D. WINNIGER

Notary Public

IN THE CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT OF ALABAMA
CRIMINAL DIVISION

Case No. 55605

STATE OF ALABAMA, PLAINTIFF

vs.

OTIS STEPHENS, DEFENDANT

MOTION TO SUPPRESS AND RULING THEREON

TO THE HONORABLE JUDGES OF THE TENTH *JUDICIAL CIRCUIT OF* ALABAMA, CRIMINAL DIVISION:

Comes now Otis Stephens, by and through his attorney and hereby moves this court to direct that any confession, statements against interest, inculpatory statements, exculpatory statements, or statements made by him on or about the 29th day of September, 1966, and further any statements or any evidence or discovery whatsoever obtained by the District Attorneys of the 10th Judicial Circuit of Alabama on the preliminary hearing held on, to-wit: the 14th day of October, 1966, and further any statements relating to any identification of the defendant while in the custody of the hereinafter mentioned officers, to-wit: C. R. Boyd, W. T. Hart, Dan Jordan, and J. F. Fordham, or during any line-up, be suppressed in that (1) he was being held in custody or put in a line-up without a warrant, any formal pleading or without probable cause to believe that he had committed a felony; (2) he was not effectively informed of his *con*titutional rights to remain silent, warned that anything he might say could be used against him, that he had a right to counsel before making any statement in any line-up or in any other manner and that if he did wish to make a statement he had a right to have counsel present at the time of making of any such statement and was told if he would make a statement it would be better for him; (3) he was not

informed that he did not have to appear in a line-up without having first the opportunity of having been advised by an attorney, nor was he advised that he had the right to assistance of counsel before appearing in a line-up and was not informed that if he did appear in the line-up and an identification was made, that it could be used against him; (4) he was not appointed counsel to represent him at the preliminary hearing which is a critical stage of the criminal proceedure in Alabama; all to his detriment and in violation of his constitutional right under the Constitutions of the United States of America and of the State of Alabama.

CHARLES A. TARTER (sig)
CHARLES A. TARTER
Attorney for Deft.

2-24-67

The State having confessed that portion of the Motion pertaining to the confession of Movant made to police officers at City Jail, said Motion is hereby granted as to said confession, and said confession, is hereby suppressed; Motion to Suppress Evidence is hereby overruled in all other aspects. Gibson, J.

Filed in Office, Jan. 30, 1967, Julian Swift, Clerk

[fol. 1] IN THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR JEFFERSON COUNTY, ALABAMA

Case Number 13635

STATE OF ALABAMA, PLAINTIFF

vs.

JOHN HENRY COLEMAN, DEFENDANT

Case Number 13657

STATE OF ALABAMA, PLAINTIFF

vs.

OTIS STEPHENS, DEFENDANT

Transcript of Trial—February 23, 1967

Honorable Wallace C. Gibson, Judge Presiding

APPEARANCES

MR. RUSSELL MCDONALD, Deputy District Attorney, Jefferson County Courthouse, Birmingham, Alabama, and MR. LOUIS WILKINSON, Deputy District Attorney, Jefferson County Courthouse, Birmingham, Alabama, for the State.

MR. WILLIAM WAYNE SMITH and MR. CHARLES TARTER, Attorneys at Law, City Federal Building, Birmingham, Alabama, for the Defendants.

[fol. 4] DIRECT EXAMINATION

Q (BY MR. TARTER:) Would you state your name and your business.

A J. L. Fordham, Jr., detective with the Sheriff's Office, Jefferson County.

Q Mr. Fordham, you have been a detective with the Jefferson County Sheriff's Department for several years?

A Yes, sir, approximately three years.

Q And were you an officer, or patrolman, before that time?

A Yes, sir, I was.

Q Did you hold any rank, other than patrolman, before you became a detective?

A No, sir.

Q I will ask you whether or not you investigated a case involving Casey F. Reynolds and Janette Reynolds, wherein Mr. Casey F. Reynolds was allegedly shot on July 24, 1966?

A Yes, sir.

Q When were you first called into this case, Mr. Fordham?

A It occurred on the night of July 24, which was a Sunday, and I was called in on the case on July 25.

Q Did you have occasion to talk with Mr. and Mrs. Reynolds on the 25th day of July, 1966?

A No, sir. At that time, Mr. Reynolds was still under sedation from the operation.

Q When was it you were able to talk with him?

A It was a couple days later. If you want the specific [fol. 5] date, I can get it for you.

Q You say it was a couple of days later. Was it in the hospital there that you talked to him?

A Yes, sir.

Q I will ask you if, at that time, you asked him what had happened? Let me withdraw that and ask you this: Was this the first case where you were able to get a statement from him regarding what had happened?

A Yes, sir.

THE COURT: When was this?

A It would have been on Wednesday, or Thursday, following the shooting.

THE COURT: Let's see, Sunday was the 24th. That would be the 27th or 28th?

A Yes, sir. It would range between the 26th and 28th.

THE COURT: That was the time you talked to the alleged victim, is that right?

A Yes, sir.

THE COURT: Okay.

Q All right, sir. I will ask you, Mr. Fordham, if you

will, to tell His Honor what Mr. Casey told you on that occasion regarding the incident on the Green Springs Highway.

MR. MCDONALD: We object.

THE COURT: Jimmy, would you read that back to me.

(Thereupon, the court reporter read the question last propounded to the witness as above recorded.)

THE COURT: I sustain the objection.

MR. TARTER: All right, sir. Let me—we except.

Q Mr. Fordham, did Mr. Casey at that time give you a description—I am not asking you what it is; I am asking you whether or not he gave you a description of the [fol. 6] alleged assailants at that time.

A I would like to give the specific date we went over there. I found my record, here.

MR. TARTER: All right.

THE COURT: All right.

THE WITNESS: It was on July 26.

THE COURT: That you first talked to Casey?

A Yes, sir, it was on the morning of the 26th.

THE COURT: All right.

THE WITNESS: Mr. Casey stated that—

MR. MCDONALD: We are going to object to the contents of the conversation.

THE COURT: Yes, I sustain that. Read that question back, if the witness' mind was on that other thing, there.

(Thereupon, the court reporter read the question last propounded to the witness as above recorded.)

Q Do you understand the question, Mr. Fordham?

A Yes, sir.

Q He did give you a description?

A Yes, sir, I guess you would call it a description.

Q All right, sir. Well, I will ask you whether or not —if, at that time, upon receipt of that description, that would be part of the evidence which you have gained during the course of your investigation, upon which you based the arrest of John Coleman and Otis Stephens?

A That description he gave us was vague, and, therefore, we took it in a general area of the description he gave us. These Defendants were not picked up on that description.

Q Were you looking for someone in accordance with this description?

A Yes, sir.

[fol. 7] MR. MCDONALD: We object, Your Honor.

THE COURT: Well, he has answered it. Don't answer so quick.

Q Once again, let me ask you whether or not this was part of the evidence you had gathered along with other evidence upon which you based your determination to arrest Otis Stephens and John Coleman.

MR. MCDONALD: We object, Your Honor. We realize it is the same question.

THE COURT: Well, overrule. You can answer.

A They weren't arrested from the descriptions.

Q That is not my question, Mr. Fordham. I don't know if you understand what I am asking you—

THE WITNESS: I don't believe I am getting it.

Q The fact that Mr. Reynolds gave you a description, did you use that as part or all of the evidence upon which you based your judgment to initiate a warrant against Otis Stephens and John Coleman?

THE COURT: Let me ask you this and see—I think I know what Mr. Tarter is getting at:

Whatever description this man gave you, regardless of how general it may have been, did it help you to narrow it down to some extent to what you were looking for? For example, whether you are looking for a white man, or black man, or short man, or tall man.

A Yes, sir.

Q I will ask you what description he gave you.

MR. MCDONALD: We object to that.

THE COURT: Rusty, I don't know how to hold this down to within the very narrow limits. They may, or may not, have had probable cause.

I would know of no way in the world, at this stage, of [fol. 8] confining it without our having to go back and call and recall witnesses.

I am going to attempt to confine the evidence to what is material, that I am going to allow some latitude in order to expedite matters.

Go ahead.

Q Do you remember the question?

A Yes, sir. They were young, black, males, close to the same age and height.

Q And that was the extent of the description?

A Yes, sir. Mr. Reynolds was in a great deal of pain the morning we talked to him. So, it was a limited amount of time we had to talk to him.

Q When he said they were close to the same age, did he give you any age range?

A Around the twenties.

Q Did he give you any height?

A No, sir, he didn't give me any specific height.

Q But he did say they were of substantially the same height?

A Yes, sir.

Q All right. Now, I will ask you if, at that time, he picked out any one individual as doing any one thing on that occasion?

A On this particular occasion, no, sir.

Q Did he use any words to identify any one individual there that evening that did anything to him?

A To the best of my knowledge, Mr. Tarter, he didn't.

Q Was the substance of your conversation with Mr. Reynolds that they were young, black, males, close to the same age and height?

[fol. 9] A Other than showing him a few mug shots, that was about it.

Q Did he identify anyone?

A No, sir.

Q And did he tell you whether or not he could identify them if he saw them again?

A No, sir, I don't believe he said whether he could, or not.

Q Did you have any other conversation with him regarding the incident on Green Springs Highway?

A No, sir.

Q Other than that. Let me ask you whether or not you talked to Mrs. Reynolds.

A Yes, sir.

Q Did you talk to her on the evening of the incident, on the 25th, or on the same day that you talked to Mr. Reynolds?

A The same day.

Q There in the hospital?

A Yes, sir.

Q And did she tell you that she couldn't identify the individual?

A Let me retract that: We talked to her the evening of the 25th at the hospital.

Q Mr. Reynolds was unconscious at that time?

A Yes, sir. He was still under heavy sedation.

THE COURT: Let me ask you something: I understood somebody, in speaking of the victims, to refer to him earlier as Mr. Casey.

MR. TARTER: I called Mr. Casey. His name is Mr. Casey Reynolds. It was a slip of the tongue. His wife's name was Janette Reynolds.

THE COURT: All right.

[fol. 10] You talked to Mrs. Reynolds when?

A The afternoon of the 25th.

Q All right. I will ask you whether or not she told you at that time and on that occasion that she could not identify the individuals?

A I don't recall whether she did, or not.

Q Did you see them sometime subsequent to that and did she tell you that she could not identify the individuals?

Well, let me withdraw that and ask you this: Did you ask her if she could identify the individuals?

A I believe she stated, to the best of my judgment—I believe she stated she did not believe she could.

Q All right, sir. Now, when did you talk with Mr. Reynolds again after you talked to him on the 26th, I believe?

A It was on August 10th.

Q And where were you when you talked to him at that time?

A In our office.

THE COURT: You talked to Mr. Reynolds in your office?

A Yes, sir.

Q Was Mrs. Reynolds present on that occasion?

A No, sir.

Q Who was present?

A Detective Jordan and myself.

Q All right. I will ask you whether or not he looked at some mug shots on that occasion?

A Yes, sir.

Q And was he able to identify anyone on that occasion?

MR. MCDONALD: We object to the form of that question, of whether he was able to.

THE COURT: Sustain.

MR. TARTER: I withdraw the question and ask you this:

[fol. 11] Q Was he able to identify any individual and place him, in his judgment, at the scene of the alleged incident?

MR. MCDONALD: We still object.

THE COURT: Same thing, did he identify anybody. If he did, or did not, this witness could testify to that. That is the basis I sustain the objection.

Q Did he identify anyone at that time and on that occasion and say that he was there at the scene?

A No, sir.

Q I will ask you if you asked him for a description or better description at that time?

A No, sir.

Q Did he, at any time subsequent to—any time that you talked to him, before the arrest of Otis Stephens and John Coleman—did he ever give you a description other than the one you have given us today?

A No, sir.

Q All right. Did he tell you on any of these occasions that he could identify them?

A No, sir, he didn't come out and tell us he could identify them.

Q Did you ask him?

A I don't recall asking him.

– Q You don't recall asking him. All right, I will ask you if he didn't tell you, on the occasion in the spring and on the occasion on August. 10, that he—if he didn't tell you that he had some sort of vague picture of them but he was not sure he could identify them?

MR. WILKINSON: We object to that. That is cumulative. It couldn't possibly be related as to whether or not there was probable cause.

[fol. 12] THE COURT: I know we are going to have difficulty for this reason:

It is going to be part of the defense, by the defense counsel, to use this as discovery, as distinguished from the issues in this motion, and I am going to avoid that as much as I can.

We are in the question and have the answers taken in detail as to what the man did tell them about the description, as to whether or not he gave them any further description than he had initially given them, and we are now going into the question of whether or not he stated he could not identify them.

I don't know at what point or what stage the probable cause you speak of is supposed to have ended. I am going to sustain the objection to going into detailed cross-examination on the basis of getting away from the issues on this motion.

MR. TARTER: If Your Honor please, may I speak on that? This is a very real part of my motion, the fact that these Defendants were not only arrested on the identification of these alleged victims but on other evidence which, all put together, is not probable cause to arrest these individuals.

THE COURT: You are saying—from the way I read your motion, it appears they were placed in a line-up.

Were they identified in a line-up?

MR. TARTER: Yes, sir, and we think this is a real part of that, not for impeaching them.

THE COURT: It would be your contention that somebody said—for the sake of argument—said, I don't think I could identify these people, but, later on, in the line-up, did identify them, and the two of them offset the other, and that would be reason for probable cause?

MR. TARTER: Yes, sir.

[fol. 13] THE COURT: I am not going to make a fishing trip out of this.

All right, Jimmy, read the question back to me, please.

(Thereupon, the court reporter read the question last propounded to the witness as above recorded.)

A The answer, I believe, to that question would be "yes", but I believe it took place on August 10 in our office.

He made some sort of statement to the effect that he wasn't sure he could identify them, or not.

Q All right, sir. At that time, you were looking for how many?

Did he ever tell you how many there were there on that occasion?

A Yes, sir. Three.

Q Three?

A Came across the highway.

Q Did he see any more?

A No, sir.

Q Then, you were looking for three young, black males, close to the same age and height, is that right?

A Yes, sir, from his description.

Q All right. Now, you were not in on the arrest of Charlie James, were you?

A No.

Q Did you ever see a picture which was allegedly taken from one Charlie James?

A No, sir.

Q Never saw it?

A No, sir.

Q All right. Now, you were not in on the arrest of [fol. 14] Otis Stephens and John Coleman, were you?

A No, sir.

Q Do you know by whom they were arrested?

A Officer C. R. Boyd, with the City of Birmingham.

Q All right. Now, I will ask you whether or not you were the one who issued the order that they be arrested?

A It would be hard to say, Mr. Tarter. There were three of us at the time—four of us that actually talked to Mr. Boyd about picking them up.

Q There were three or four of you that were investigating this incident, jointly issued the order that they be arrested, is that right?

A I believe Mr. Boyd was looking for Otis Stephens and John Hodge on city escape charges at the time.

Q But my question is still whether or not the three or four of you still jointly issued the order for this case, not the city case, or something else, but this one.

A Yes, sir.

Q I will ask you if, at that time that the order was issued—I will ask you whether or not Robert Steele had been arrested.

A No, sir.

Q Had you talked to Robert Steele?

A No, sir.

Q Had any of the detectives talked to Robert Steele?

A No, sir.

Q That you know of?

A No, sir.

Q Within your knowledge?

A No, sir.

Q Did you, at the time the order was issued for the [fol. 15] arrest of Otis Stephens and John Coleman, to be arrested—

A And John Hodge.

Q And John Hodge?

A Yes, sir.

THE COURT: That was Otis Stephens and John Hodge?

A And Coleman.

THE COURT: All right, go ahead.

Q I will ask you if it isn't true that all you had to go on was the fact that they were young, black males, close to the same age and height?

A Yes, sir.

Q Is that right?

A I believe I have answered the question wrong before.

Q All right, which one did you answer wrong?

A John Hodge was asked to be picked up, and Otis Stephens, those were the only two, when we talked to Officer Boyd, that were told to be picked up.

Q Steele had been arrested?

A No, sir.

THE COURT: Let me be sure I follow you:

At the time you asked Officer Boyd to pick up Hodge and Steele, you say at that time he had an arrest order for Stephen's arrest for city escape?

A Yes, sir, Stephens and Hodge. There was an arrest order out for them by the City.

THE COURT: Did you ask him to pick them up on that city arrest order?

A No, sir. We told them we had information they were involved.

THE COURT: In this offense?

A Yes, sir, and asked him to pick up John Hodge for [fol. 16] us, and, possibly, Otis Stephens, too, if he could catch him.

THE COURT: Did you tell him to put him in jail on this case or on the old escape case?

I am trying to find out if the escape case figured in there.

A I don't recall. I know we did tell him to pick him up on this case, here.

Q But the order was on this case, here?

A Yes, sir. We told him we wanted to talk to them.

Q They ended up in jail, didn't they?

A Yes, sir.

Q And didn't Otis Stephens—wasn't he arrested subsequently, and wasn't Coleman arrested?

A Yes, sir.

Q And weren't they arrested on conjunctive order in this case?

A Yes, sir.

THE COURT: Who is that?

MR. TARTER: John Coleman and Otis Stephens.

Q And Steele had not been arrested at that time?

A We also issued an order to pick up Steele as a result of this.

Q Did you go—were they taken to the city or county jail?

A City.

Q Did you go down to interrogate the Defendants?

A Yes, sir.

Q And who went with you?

A Detective Hart, Vernon Hart, with the City, and Sgt. Limbaugh, with the City.

Q All right. What time did you arrive at the city jail?

[fol. 17] A Approximately 5:15 to 5:30 p.m.

Q Do you have an independent recollection of that, or are you going by your notes?

A That is an independent recollection, because I was due to pick up my wife at 5:00 o'clock, at Southern Bell, when she got off, and I had just arrived at Southern Bell when I received notice that John Hodge had been picked up, and I went straight to the city jail.

Q Do you know whether it was dry or wet that day?

A No, sir, I don't remember.

Q You don't remember?

A No, sir.

Q Do you remember what you were wearing that day?

MR. WILKINSON: Judge, we object to that. That is getting far afield.

MR. TARTER: We offer that for the purpose of testing his recollection as to whether he is relying on his notes, or—

THE COURT: Sustain the objection. If I am in error, we can try the whole case over again later. I don't have that much time. If you want to ask direct questions, ask them, but, so far as going through a dress rehearsal on it, I don't think we are going to be able to conduct this hearing that way.

MR. TARTER: All right, sir. We except.

Q Did you meet Mr. Limbaugh and Mr. Hart there, or were they already there when you got there?

A Mr. Hart was there.

Q Did Mr. Limbaugh arrive after you did?

A I don't recall if he arrived or was somewhere else in the building at the time.

Q Do you know where Coleman and Stephens were at the time?

A Probably at home. They hadn't been picked up.

[fol. 18] Q They hadn't been picked up?

A No, sir.

Q Were you waiting on them to arrive?

A John, and his twin brother, James, were already there.

THE COURT: James Hodge is the twin brother to whom?

A John.

Q John isn't involved in this case, is he?

A James, either.

Q James isn't charged in any of these cases?

A No, sir.

Q How much later was it that Otis Stephens and John Coleman arrived?

Are you referring to your notes, Mr. Fordham?

A I am referring to the statements, but I will place the time according—

Q You are referring to some notes you have there in the file, is that right?

A Yes, sir.

Q All right.

A Otis Stephens, he was picked up sometime prior to 11 that night. As to the exact hour, I couldn't tell you.

Q Do you remember whether or not you saw him that night?

A Yes, sir.

Q You did? All right, and you are reading that from your notes, or from an independent recollection?

A From my memory.

Q From your memory?

A Yes, sir.

Q In other words, you remember when you arrived there?

A I remember it was prior to 11 o'clock.

Q All right. Now, let me ask you whether or not John [fol. 19] Hodge, when you were interrogating him, was it in one of those little rooms at the city jail?

A Yes, sir.

Q All right. I will ask you whether or not John Coleman and Otis Stephens were brought into one of those little rooms?

A Yes, sir, at later times.

Q Who was brought in first?

Are you referring to your notes again, Mr. Fordham?

A Yes, sir, partially.

THE COURT: Wait until he answers it to ask him if he took that from his notes.

Every time you interrupt him I forget the question, and it is confusing to him.

Let him answer it first.

Read the question, Jimmy, please.

(Thereupon, the court reporter read as follows: "Who was brought in first? Are you referring to your notes again, Mr. Fordham?")

THE COURT: Who was brought in first?

A John and James Hodge was brought in first, and then John Henry Coleman and then Otis Stephens.

Q All right.

A And then Robert Steele.

Q All right. Now, were each of them placed in separate rooms?

A Yes, sir.

Q All right. Would you give us your judgment as to the dimensions of those rooms?

MR. MCDONALD: We object to that, Judge.

MR. TARTER: If Your Honor please—

[fol. 20] MR. MCDONALD: Dimensions of the room to go to the probable cause?

MR. TARTER: If Your Honor please, there are numerous cases concerning—

THE COURT: You might not need to go into all that, if I undersand fully what you are talking about.

Are we leading up to the size roms they were brought into shortly after giving a statement?

MR. TARTER: Yes, sir.

THE COURT: Overrule.

A I would say the room is about eight to ten feet long, and, maybe, four to five feet wide.

Q All right. If you walk into the hallway, there are rooms on the right and on the left, is that right?

A I believe there are three each on each side.

Q Do you remember which roms each individual was put into?

A John Coleman, I believe—it is John Henry Coleman, isn't it?

MR. TARTER: Yes, sir.

THE WITNESS: —was placed in the first room on your right.

Otis Stephens, when he was brought in, was placed in the first room on your left.

John Hodge was placed in the last room on your left, and James Hodge was placed in the last room on the right.

Q I will ask you whether or not those rooms have windows in them?

A Small ones, I believe.

Q Very small windows?

A Yes, sir.

Q I will ask you whether or not each of you took turns [fol. 21] interrogating each individual?

A No, sir.

Q You did not?

A No, sir.

Q All three of you talked to one at a time, is that right?

A It was decided that one would talk to them and take statements and the statements were taken by that person.

Q Were all three of you present in each room each time that the Defndant was talked to?

A No, sir.

Q Were there occasions when there was one police officer in there?

A When one investigating officer talked to one Defendant?

Q Yes, sir.

A To the best of my memory, there was always at least two of us in there.

Q Two of you. All right. Now, you talked to Hodge first. Who was the next individual that you talked to?

A Coleman.

Q Coleman?

A Yes, sir.

Q Who went with you to talk to Coleman?

A Detective Hart.

Q Are you referring to your notes once again?

A Yes, sir.

Q Are you referring to the fact that Detective Hart's name is on a statement?

A Yes, sir, and, then, there was the lady, the secretary from the City Hall, that took the statement down, Miss Maxine Shotts.

[fol. 22] Q On the first occasion when you talked to John Coleman, did he make a statement immediately?

A No, sir.

Q Did you have to go back a second time?

A Yes, sir.

Q Then, it was possible that Detective Hart was not with you when you went to talk with him the first time, is that right?

A Detective Hart was with me the first time I went to talk to him.

Q And the second time?

A Yes, sir.

Q Was it two times that you talked to him, or once?

A Can I clarify that first talking to him?

Q Go ahead.

A When we first walked in, to talk to Coleman, he said he was sick, and, then, we had—I believe we took him to see the nurse.

Q Who took him to see the nurse?

A I don't recall, right off. I know I didn't take him.

Q Do you know how long he was gone?

A No, sir.

Q On that first occasion, when you went in there, he didn't give you a statement, is that right?

A That is correct.

Q And the second occasion, did he give you a statement?

A I believe that was the time he gave us a statement.

Q And it is your judgment you only went in there twice?

A Yes, sir.

Q Do you know whether any other police officer went in there, of your own knowledge?

A Not to my knowledge they didn't.

[fol. 23] Q There was a third detective there, was there not?

A There was Detective Limbaugh and—now, this is—I know, in the hallway, there was Captain McDowell, also.

Q When you were in the room with Detective Hart, with John Hodge, you don't know where Detective Limbaugh was, do you?

A No, sir.

Q Was he in that immediate vicinity of the interrogation rooms when you went in to talk to John Hodge?

A When I was there talking to John Hodge, Detective Hart and Sergeant Carl Limbaugh, of the City, were in there with me.

THE COURT: When you were talking to Hodge?

A When I took a statement from John Hodge.

Q I will ask you whether or not you are referring to your notes again?

A Yes, sir, I am.

Q When you first went in there to talk to Coleman, let me ask you whether or not you introduced yourself to him?

A To recall what I did, word for word, I couldn't tell you. As a general rule, I do.

Q As a general rule?

A Yes, sir.

Q All right. Do you recall whether or not Detective Hart introduced himself to him?

A I couldn't say one way or the other.

Q All right. Now, do you recall what you said to the Defendant, John Coleman, the first thing you said to him when you went into that room?

A No, sir.

Q You don't?

A No, sir.

THE COURT: We are back to Coleman, now. We [fol. 24] talked about Hodge and are back to Coleman now?

MR. TARTER: Yes, sir.

Q You don't recall what you said to him, is that right?

A Yes, sir.

Q And it was during this trip he said he was sick?

A Yes, sir. He began perspiring heavily.

Q Did you, during this occasion, accuse him of having any part in this particular incident with which he is charged?

A I don't recall.

Q You don't recall?

A No, sir.

Q Do you recall how long you were in there the first occasion?

A It was just a short length of time.

Q Do you recall whether or not you discussed the facts of the case, or the alleged facts?

A I don't believe we did.

Q But you are not sure of that?

A That is in my best judgment, I don't believe we did. I wouldn't say positively we didn't.

Q So, you don't remember whether, on that occasion, you told him he had a right to a lawyer, or anything he said could be used against him and he had a right to remain silent.

Do you remember telling him that on that occasion?

A No, sir.

THE COURT: Are we talking about the first time, when he said he was sick?

MR. TARTER: Yes, sir.

Q He didn't. Is that right?

A I don't recall it if I did.

Q You don't recall it. All right. Now, after he left [fol. 25] and went somewhere, after he said he was sick, you don't know that he went to the nurse, do you?

A No, sir, I couldn't honestly say whether he left the room, or not.

Q You don't know, is that right?

A I can't remember whether he did, or not.

Q Do you remember where you went after you left the room?

A I know we went out into the section that the wardens work out of.

Q Let me go back and ask you whether or not you told John Coleman at that time and on that occasion what he was under arrest for?

A No, sir.

Q And I will ask you if you know, of your own knowledge, whether anyone had told him what he was under arrest for.

A No, sir, I don't know.

Q How long had he been sitting in that little room before you and Detective Hart came in there?

A When he was taken in there, we were talking to John Hodge. He must have been in there, in my best judgment, something like thirty minutes to an hour.

Q This was late at night, or early in the morning?

A No, sir, this was earlier in the evening.

Q What time?

A Somewhere between dark and—well, I know it was prior to 11:00, but it was sometime after dark, just a short time.

Q Didn't you say that John Coleman and Otis Stephens were not brought in until 11:00 o'clock, or afterwards?

A No, sir. I said he was brought in prior to 11:00 o'clock.

Q Just how much prior to 11:00 o'clock?

[fol. 26] A That, I don't remember.

Q You don't remember. Could it have been 11:00 o'clock, in your judgment, or just a few minutes before?

A No, sir. It would have been—well, now, Officer Boyd brought them in and he was working the 3:00 to 11:00 shift for the City, but when Robert Steele was picked up he was brought in between 11:00—between the 11:00 to 7:00 shift.

Q How much later was it that Robert Steele came in after Coleman and Stephens had been brought in?

A I couldn't tell you the exact length of time.

Q You don't have any judgment?

A I wouldn't make a judgment on it.

Q All right. So, it could have been after midnight, before you got to Stephens—I mean, Coleman?

A It would have been—are you referring to the time that we took statements?

A I am referring to the time you went to Coleman and he was allegedly sick.

A That was earlier than 11:00 o'clock.

Q But you are not sure what time they were brought in?

A I am sure they were brought in before 11:00.

Q Okay. All right, now, did you tell me where you went after you left Coleman?

You said you went to the wardens room after you left Coleman, is that right?

A Yes, sir.

Q How long did you stay out there?

A I have no judgment.

Q You have no judgment. Do you have a judgment as to when you went to see Otis Stephens?

A It would have been sometime after midnight.

[fol. 27] Q Sometime after midnight?

A Yes, sir.

Q Do you have a judgment as to how long Otis Stephens had been sitting in the room before he was talked to?

A He had been sitting there long enough for us to offer him something to eat.

Q Do you remember offering him something to eat?

A Yes, sir, I remember offering him something to eat.

Q Did you offer him something to eat?

A Not personally.

Q Did you hear someone offer him something to eat?

A Yes, sir.

Q Would you say he had been sitting there two hours or two and a half hours or three hours?

A Just as a judgment, I would say he had been in there somewhere around an hour to two hours.

Q Between an hour and two hours?

THE COURT: Let me refresh my recollection. We are talking about Stephens. Was Stephens brought in between the 3:00 to 11:00 shift, or 11:00 to 7:00 shift?

A He was brought in by Officer C. R. Boyd, and he works the 3:00 to 11:00.

Q I will ask you whether or not you had told Otis Stephens what he was under arrest for.

A No, sir.

Q Did you hear anyone tell him what he was under arrest for?

A I don't recall whether anyone did, or not.

Q At the expiration of an hour, or an hour and a half, or two hours, you went in to see Otis Stephens, is that right?

A I went in to question him, yes, sir.

[fol. 28] Q Who went with you?

A Detective Vernon Hart.

Q You are referring to your notes again?

A Yes, sir, because—

Q Are you saying—your answer was "yes, sir"?

A Yes, sir.

Q And you are saying that Detective Hart was with you because his name is on the statement?

A Yes, sir, because I only visited Otis Stephens one time.

Q You only visited Otis Stephens one time?

A Yes, sir.

Q You remember that?

A Yes, sir.

Q I will ask you if, when you went in to see Otis Stephens—whether or not you introduced yourself?

A Again, I would have to answer that as a general rule I do. Whether I actually did to him, or not, I don't know.

Q I will ask you if Detective Hart introduced himself to him?

A I don't know.

Q I will ask you who spoke next, if anything was spoken or said?

A I don't recall which of us said what.

Q You don't recall which of you said what?

A The next words that were spoken.

Q All right. Do you recall Detective Hart going into the alleged facts with Otis Stephens?

A I believe, in all the cases, the facts were gone into prior to the taking of the full statement.

Q I am not asking you what you believe. I am asking you what you remember, specifically.

[fol. 29] THE COURT: When you say you believe, you mean that is the best of your knowledge, your best recollection, is that what you say?

A Yes, sir.

THE COURT: Is that the best of your recollection, or are you guessing?

A No, sir. That is the best of my recollection.

THE COURT: A lot of people say, "I believe". You don't need to clutter the record up with this.

(Thereupon, ensued an off the record discussion, following which the following proceedings were had and done:)

Q That is your best judgment, is that right?

A Yes, sir, in my best judgment, the facts of the case were goine into with all of them prior to taking the statements.

Q But you have no individual recollection of it, is that right?

A Just remembering whether it was word for word, I couldn't tell you.

Q I am talking about, with Otis Stephens.

Do you have an independent recollection of Sergeant Hart, or yourself, standing in front of Otis Stephens, or sitting in front of Otis Stephens, and going into the alleged facts with him?

A Not an independent recollection.

Q All right. Now, I will ask you whether or not, in your best judgment, that was the first thing that was done, gone into the facts with him?

A To the best of my recollection, that is what would have taken place.

[fol. 30] Q And did Sergeant Hart accuse him—you or Sergeant Hart accuse him of being one of the individuals that took place in the incident on Green Springs Highway on July 24, 1966?

A Let me see if I understand it correctly:

Did one of us stand in front of him and accuse him of being one of the persons taking part in that?

Q Yes.

A I couldn't tell you yes or no, Mr. Tarter.

Q You don't know?

A I don't recall. I know—I will let it stand at that.

Q All right. Now, you don't remember specifically what was said, or you don't have any recollection of what

was said on that occasion that you talked to Otis Stephens, is that right, other than the statement you have in your notes?

A The statement would just about consist of what the conversation was prior to taking the statement.

Q In other words, what you said and what he said and what Detective Hart said, is that right?

A Yes, sir.

Q And you have that in the statement?

A Yes, sir.

Q And what you said and what Hart said and what Stephens said, it that right?

A Only between Stephens and myself is in the statement.

Q Was anything else said in the room that was not taken down in the statement?

A In taking a statement—

Q Just answer my question yes or no, whether or not anything else was said in that room that was not taken down in that statement.

[fol. 31] A The statement does not give word for word what was said in the room prior to taking the statement.

Q Once again I will ask you the same question, whether or not other things were said in that room that were not included in the statement?

A It is possible.

Q Possible. In your judgment, was there?

A I wouldn't make a judgment on it.

Q I will ask you whether or not Robert Steele was brought into the same room with Otis Stephens?

A No, sir. To the best of my recollection, he wasn't.

Now, they bruoght into the room—he was brought into the room with Otis Stephens, John David (sic) Coleman and John Hodge.

Q After the statements were made, or before?

A Afterward.

Q After?

A Yes, sir.

Q I will ask you whether or not you told Otis Stephens that he had a right to a lawyer?

A Yes, sir.

Q Is that the first thing you said?
A You mean, when I walked in?
Q Yes.
A I don't recall it being the first thing. I don't know what hte first thing I said to him was.
Q What was the first thing Detective Hart said?
A I don't know what the first thing was, or the exact conversation, the first conversation, what it was when we walked in.
Q You were there to interrogate him regarding this [fol. 32] incident, weren't you?
A Yes, sir.
Q All right. So, is it possible you talked to him for some period of time before you say you told him he had a right to a lawyer?
A Not about the facts of the case, no.
Q Are you sure of that?
A Yes, sir.
Q Do you have an independent recollection of that?
A Yes, sir.
Q All right. But you are not sure whether that was the first thing you said, or not?
A No, sir, I don't recall whether that was the first thing I said, or not.
Q I will ask you whether or not you told him that he had a right to remain silent?
A This was prior to being asked any of the facts in the case?
Q Any time in there, did you tell him that?
A Yes, sir.
Q When did you tell him that?
A Prior to talking to him about the facts of this case.
Q Can you associate it with any sentences before, or any discussion before, or after?
A Only so far as asking—advising him of his constitutional rights.
Q Who advised him of his constitutional rights?
A I would have.
Q You say you would have. Do you remember?
A Yes, sir. Now, wait a minute. When I say "yes, sir", that is a statement. I don't recall—I believe I did, in

[fol. 33] my best judgment.

Q But you are not sure?

THE COURT: Gentlemen, let me say this: Excuse me. Go ahead.

A I was the one to do the interrogation, therefore I would have been the one to have told him of his constitutional rights.

THE COURT: Let me ask you, if you will, either from your recollection, or from your notes, there—I am going to interrupt the examination so that I can get this fixed in my mind, and the rest of the examination can hinge around it:

Would you tell me what you, or somebody else in your presence or hearing, informed him as to his constitutional rights, as to whether or not he had a right to have a lawyer and he did not have to make a statement, so that I can get that down here, in one place, and refer to it.

I am having trouble keeping up, here.

A Let me say this, Your Honor:

It has been my rule that, on the questioning of prisoners, since the Miranda case, to inform them as to their constitutional rights.

THE COURT: Do you have any recollection of him having been informed that in this particular case?

We have got to boil it down to this individual case. I am talking about what this man was told, there, prior to the time the facts in this case were discussed with him, about his right to counsel and that sort of thing, and the right to remain silent.

Do you remember, other than knowing what you usually do?

A To sit right down and tell you that I sat right in front of that Defendant and advised him of his constitu-
[fol. 34] tional rights, and tell you I remember doing it, word for word, no; I cannot do it.

THE COURT: Do you remember doing it and what you generally covered in it?

If you remember doing it, remember generally what you informed him, without word for word, that is what I am getting at.

A Yes, sir. Can I qualify the answer?

THE COURT: Tell me what the qualification is going to be.

THE WITNESS: The reference to his having been advised, that comes out of the written statement taken from the Defendant.

THE COURT: All right. It is written in there?

A Yes, sir, and referred to as having been already advised.

THE COURT: Well, do you have any recollection of his having already been advised?

What I am getting at is this: It has been ruled, from time to time, that where you got something just stuck into a written statement that that is not sufficient, unless it was shown it was actually and knowingly waived by the man, and would make a question as to whether or not it was just written in the statement and read to him as a part of the statement, or whether or not it was discussed with him in advance, and it would be material and critical in this thing for somebody trying to decide whether or not it was actually told to him in advance, or whether or not it was just routine and put in the statement and read to him.

I am trying to find out if you have a recollection of that having been discussed with him and him having been informed of those things prior to his giving a statement, and whether or not it was just read to him.

[fol. 35] If you don't remember, tell me you don't remember. I am trying to find out if you do remember, or if you don't.

THE WITNESS: Well, I would have to use my notes and his statement, the conversation held between us.

THE COURT: You mean, in the actual statement, itself?

A Well, in the oral interrogation in the statement taken down by Mrs. Shotts. That would be the only way I would be able to determine whether I had advised him.

THE COURT: In taking the statement, I assume you would follow the practice you generally followed in taking a statement. Once you get down to the point of talking about the facts and you go over the facts, and you pretty

well boil it down, and then you start letting the girl take it down, is that right?

A Question and answers.

THE COURT: And your questions are taken down word for word?

A Yes, sir.

THE COURT: What was worrying me was whether or not you had a recollection of having advised him prior to discussing with him about the facts and prior to it being put on paper.

THE WITNESS: I don't have an independent recollection of advising him in that way.

Q And that would apply to John Coleman?

A John Coleman, John Hodge, and Steele.

Q All right, sir. Now, when did you end your interrogation of Otis Stephens? Do you remember the time?

A It would have been sometime after 3:40 a.m.

Q In the morning?

A On the morning of October 4, the first time.

[fol. 36] Q All right.

A October 1st.

Q So, he had been brought into that room sometime before 11:00 o'clock in the evening, and the interrogation was not concluded until sometime approximately at 3:40 a.m. the next morning, is that right?

A Or shortly thereafter, yes, sir.

Q Did he remain in that room that you have described to us the entire time?

A To the best of my knowledge, he did.

Q All right. Now, I will ask you whether or not he did give you a statement?

A Yes, sir.

Q That is, John Coleman and Otis Stephens?

A Yes, sir.

Q May I see them?

A Yes, sir.

MR. MCDONALD: We object to that, may it please the Court.

THE COURT: What grounds?

MR. MCDONALD: On the ground he was not referred to this statement, to testifying about any content of it, and, subsequently, the defense counsel—

THE COURT: Let me ask you: You did, as I would recall, up to this point, take a written statement from this man at that time that would incriminate him?

A An unsigned statement.

THE COURT: Was it read back to him?

A Yes, sir.

THE COURT: Even though it isn't signed, did he signify in any way by saying, "yes, that's right, that statement is correct," or what did he say, if you remember?

[fol. 37] MR. MCDONALD: Your Honor, may we withdraw our objection?

THE COURT: I need to know those things. I was going to overrule you anyway, but I need to know those things, anyway.

A I don't believe he was asked that.

THE COURT: I am trying to find out if we are dealing with a written confession which, as such, might be offered in evidence, or whether we are dealing with a verbal confession.

The law says, when a man has made a confession, and it is written up and read to him, and he says, "yes, that is correct, what is in that statement, that is what happened," and then he refused to sign it—the Alabama Appellate Courts say that may be admitted in evidence, just like it is signed, and that is what I am asking the question about, because that is something that will come up.

But you don't remember whether it was read back to him and whether he indicated it was correct, or not?

A It was not typed until three days later, and he did not signify one way or another.

I believe Mrs. Shotts read it back from her notes as she took it.

Wait a minute. I am not sure she read it back to him, or not. I couldn't say for sure she even read it back, Your Honor.

THE COURT: Is what you got there what she told you over there?

A Yes, sir.

THE COURT: All right. Overrule. You may look at it.

MR. TARTER: May I have just a minute to look at it, Judge?

THE COURT: Yes, sir. Gentlemen, we will be in recess for a few minutes. We have been going a good [fol. 38] while, here. Jimmy is going to have to rest, too.

(Thereupon, proceedings were in recess from 3:40 p.m. until 4:07 p.m., of the same day, at which time the following proceedings were had and done:)

THE COURT: All right, I think, Mr. McDonald, you wanted to make a statement to the Court.

MR. MCDONALD: Yes, sir. May it please the Court, the State is prepared at this time to confess that part of the motion to supress, that deals directly with a written statement and/or oral statement, of the Defendants Otis Stephens and/or John Henry Coleman, that have been—that testimony has been taken—adduced from those conversations had by Officer Fordham and by Officer Hart, at the City Jail, on the date immediately following the arrest, that has been the subject matter of this enquiry so far.

THE COURT: All right.

MR. TARTER: Judge, this is surprise to me. May I have just a moment to talk to Mr. McDonald? There are a couple things I left out that are important. If I could speak to him just a second, it might save some time.

THE COURT: All right.

(Thereupon, proceedings were in abeyance from 4:11 p.m. until 4:17 p.m., of the same day, at which time the following proceedings were had and done:)

MR. TARTER: Judge, do I understand the statement, that he wanted to confess the motion to suppress the evidence as to any statements, inculpatory statements, or confessions, made by either of these two Defendants over there at that time?

[fol. 39] Is that correct?

MR. MCDONALD: Yes, sir.

MR. TARTER: As I understand it, Judge, from this standpoint, I need to ask one or two more questions with

reference to statements made. It shouldn't take more than two questions, I imagine.

THE COURT: All right.

Q Mr. Fordham, do you know of any other statements made by either the Defendant, John Coleman, or Otis Stephens, any time subsequent to their arrest and up until the final interrogation?

A You mean, any statement?

MR. MCDONALD: Does the question encompass "any other"?

MR. TARTER: Let me rephrase it:

Q Let me ask you, do you know, of your own knowledge, any statement made by John Coleman, or Otis Stephens, to any other officer, or to yourself, any time between the time they were arrested until the time that the final interrogation ended?

THE COURT: Other than these statements.

MR. TARTER: Other than these statements.

MR. WILKINSON: Is that the final interrogation? Is that what you mean?

MR. TARTER: Let me withdraw that question.

Q I will ask you, in another way, did Otis Stephens, or John Coleman, make any statement to you other than what we have discussed here today, at the City Jail?

A That is, after their arrest, or any time before their arrest?

Q It was confined to after their arrest.

A Only the facts we discussed prior to the taking of the formal statement.

[fol. 40] MR. TARTER: Judge, will you—

THE COURT: I think I know what you are getting at. Let me explain to Mr. Fordham what I think it is.

MR. TARTER: Yes, sir.

THE COURT: So far as I know, and, especially so far as Mr. Tarter knows, the only statements that the State was relying on in the prosecution of these cases, wherein these Defendants are alleged to have incriminated themselves in this indictment, were the ones made at the City Jail that night while you all were interrogating them.

I think he is trying to be sure and just know whether some other statement was made before then, at some other time, or made at some other place, where they incriminated themselves.

THE WITNESS: By the two Defendants?

MR. TARTER: Yes, sir.

THE WITNESS: No, sir.

Q Would that same statement apply to any other officers to your knowledge?

A I don't know.

Q Have you discussed it with any other officers, with reference to statements made before or after or during these interrogations?

THE COURT: Have you heard any of them say they have made any other statements?

A No, sir, I haven't heard they have made any other statements.

MR. TARTER: I assume, Judge, we will be able to call them one by one and ask them whether or not that is true?

THE COURT: Why don't you all step out there and find out right now if we are dealing with any other statements besides these.

[fol. 41] I would like to know, myself.

THE WITNESS: He was referring to these two, here (indicating)?

THE COURT: Yes, sir, these two.

THE WITNESS: All right, I have got it straight.

(Thereupon, counsel on both sides leave the courtroom, and, upon their return, the following proceeding were had and done:)

THE COURT: Did you all get the answer?

MR. MCDONALD: Yes, sir.

MR. TARTER: Judge, for the record, I think Mr. McDonald will concur that there isn't, so far as other officers involved in this case; there are no other statements made by John Coleman, or Otis Stephens at any time to any of the officers involved in this case.

THE COURT: All right.

MR. TARTER: Thank you, Judge.

Q Mr. Fordham, did Mr. or Mrs. Reynolds, either one, give you a description of the automobile in which the individuals were riding, that is, the individuals whom they said assailed them?

THE COURT: What portion of the motion is this addressed to? I am trying to keep up and know what we are doing.

MR. TARTER: We anticipate that they might possibly attempt to show that these Defendants were riding in a car different from the one in which the individuals who committed this incident were actually riding, and we offer it for that purpose.

THE COURT: What phase of this motion would it be material to?

[fol. 42] A lot of things might come up in the course of the trial that you might want to refute and say that it is contradictory.

Of course, that would be a question of fact in the case proper.

Where does it tie in with this motion?

MR. TARTER: There was a statement in there about a car. I don't know whether Detective Fordham went and found a car that was as a result of this confession and there being admitted into evidence, such as fingerprints and that sort of thing on the car, of the four people.

What I am trying to say is, the fact that, possibly, if they did find this car, which was so named, they found it as the result of the statement.

THE COURT: You are going into the fruits—

MR. WILKINSON: Wouldn't the trial proper be the proper time to go into that?

THE COURT: I am trying to keep this from going into a long hearing. I would prefer you handle it during the course of the trial, because, in spite of all we can do, there will be some of it we are still going to have to take up on the trial.

MR. TARTER: My motion asked that all the evidence which was obtained as a result of the illegally obtained confession be suppressed also, and that is what I am getting at here.

THE COURT: I know that. Of course, other than the portions ruled on, I could take the entire motion and file the motion under advisement, hold it in abeyance.

I am trying to pick out these things that are going to be lengthy and get them over with. These other things, you can handle them during the course of the trial. I am afraid we are all going to be so confused—

[fol. 43] MR. TARTER: I can probably find that out in the hall from Mr. Fordham, Judge.

THE COURT: Yes, sir.

Q Mr. Fordham, was there a line-up in which Otis Stephens and John Coleman were placed as a result of this case?

A I have only hearsay that it was.

THE COURT: You were not present at the line-up?

A No, sir.

Q You were not present?

A No, sir.

Q All right. Were you present at the preliminary hearing, where these Defendants were brought before His Honor, Judge Gwin?

A Yes, sir.

Q I will ask you whether or not they were represented by counsel at that time?

MR. MCDONALD: We object to that, Your Honor.

THE COURT: Charlie, let me say this:

I would like to know these things, because I think it would help during the trial. Let me say this:

It has been my consistent ruling, and I don't know of any law to the contrary, that, on the basis of what happened at the preliminary hearing, that if a lawyer was not representing the defendant that anything that may have occurred at that preliminary which might work against the defendant, whether it be anything he said there, assuming he might have taken the stand, anything of that nature, would, on the trial of the case on the merits, be inadmissible.

I wouldn't anticipate the State offering anything like that, but that has been my ruling on that ever since we changed some of our ways of doing things.

It wouldn't be material from the standpoint that a man [fol. 44] down there, when not represented by counsel on the preliminary, made some statement, said, "I am guilty." You know, a lot of times he might say, "I am guilty."

That that would not be admissible if he weren't represented by counsel, and that sort of thing.

They were not represented by counsel, were they?

MR. TARTER: No, sir.

THE COURT: If it does come up, it won't take me long to rule on it.

MR. TARTER: My question was, any statements made by the Defendants at the preliminary hearing, would there be a question that they would be suppressed?

THE COURT: If they were not represented by counsel down there, it wouldn't be admissible here.

In my opinion, it would be clearly illegal and reversible.

Q For the record, were they represented by counsel?

A No, sir.

MR. TARTER: That's all.

CROSS EXAMINATION

Q (BY MR. MCDONALD:) At the time that you have been talking about having—before Otis Stephens and/or Reynolds was arrested—I mean, Coleman was arrested, do you know whether or not one Charlie Lee James had been arrested?

A Yes, sir.

Q Do you know whether or not it was for some other crime other than this?

A Yes, sir.

Q Do you know whether or not a pistol was taken from his possession at the time he was arrested?

Do you have that information?

[fol. 45] A Yes, sir.

MR. TARTER: We object to it and ask that the answer be excluded. It is hearsay.

MR. MCDONALD: Going into the probable cause of arrest.

THE COURT: I can't think of this phase of probable cause that would come into play unless there is something else they want to pursue.

MR. TARTER: No, sir.

THE COURT: I was reading this motion, and they say—I don't think you have that involved.

That was my fault you were taken on that snipe hunt.

MR. MCDONALD: That's all.

(Witness Excused)

MR. TARTER: Mr. Vernon Hart.

VERNON T. HART, called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (BY MR. TARTER:) Would you state your name and your business, please?

A Yes, sir. Vernon T. Hart, detective, with the City of Birmingham.

Q Mr. Hart, were you employed in the investigation of an alleged assault with intent to murder on the Green Springs Highway, on July 24, 1966?

A Yes, sir, I was.

Q And did you have occasion to meet Mr. Casey Reynolds and his wife, Janette Reynolds, during the course of that investigation?

A Yes, sir.

[fol. 46] Q Subsequent to the arrest of John Coleman and Otis Stephens, did you place them in a line-up?

A Yes, sir.

Q And, before you placed them in a line-up, did you tell them that they did not have to go into that line-up if they didn't wish to?

A No, I didn't.

MR. MCDONALD: We object to that.

THE COURT: Overrule.

Q Did you tell them they had a right to counsel, or presence of counsel, before they went into that line-up?

A No, sir.

Q And did you tell them if they went into that line-up and were identified that it could be used against them?

A No, sir.

Q And did you tell them that they had a right to refuse to go into that line-up if they didn't wish to?

A No, sir.

Q All right. Now, you have some notes in your hand, is that correct?

A Yes, sir.

* * * *

[fol. 50] Q I will ask you what you told Mr. Casey.

A We told him that we had some more in jail that we wanted him to look at.

About that time, the six men were brought in by the warden, up on the stage, and as Otis Stephens—he didn't get to his position on the stage, which was number one, when Mr. Reynolds identified him as being one of his assailants.

Q Being one of his assailants?

A Yes, sir.

Q And you hadn't said anything to him to the effect that he was there to see some people that were in jail?

A No, sir.

Q You didn't tell him they had anything to do with the case?

[fol. 51] A Yes, sir.

Q Did you tell him—

A I recall that we told him that we had somebody in jail we wanted him to look at.

Q How many people were in the line-up?

A Six men.

Q Do you remember their approximate height?

A Not offhand. I made notes at the time.

Q Would you refer to the notes, there?

A Yes, sir. The man in number one position was six feet two inches tall; the man in number two position was five feet eight inches tall; number three position was five feet four and one-half inches tall; man in number four position was five feet seven inches tall; the man in number five position was five feet eleven inches tall; and the man in number six position was six feet tall.

* * * *

[fol. 52] Q And were any of the other companion Defendants in the line-up?

A John Hodge.

Q John Hodge. All right, now,—and were they all Negro boys?

A Yes, sir.

Q And were they all approximately the same age?

A As well as I remember, they were.

Q Did Mr. Reynolds tell you whether or not he recognized John Hodge?

A Mr. Reynolds stated that number four, or five, looked familiar.

Q But he wasn't sure?

A But he wasn't positive.

THE COURT: Number what?

A Number four or five position.

Q Number four would have been Howard Bonner, and number five would have been John Hodge?

A Yes, sir.

Q You said number four or number five looked like someone out there, is that right?

A Yes, sir.

Q You released number four, is that right?

A Yes, sir.

Q And he didn't positively identify John Hodge?

A No, sir.

* * * * *

[fol. 53] Q Well, do you remember Otis Stephens stepping forward and giving his name and address?

[fol. 54] A Yes, sir.

Q And do you remember Otis Stephens then saying, "Get down in the woods," or something to that effect?

A Yes, sir.

Q You do?

A Yes, sir.

Q And he did that at your request?

A All of them did.

MR. TARTER: Thank you very much. That's all.

THE COURT: All right, proceed.

CROSS-EXAMINATION

Q (BY MR. MCDONALD:) Mr. Hart, let me see if I have this straight:

I believe you said, did you not, that Mr. Reynolds actually picked out and conveyed such picking out of one of these two Defendants before they had even gotten to their station?

A Yes, sir.

Q Nobody had said anything at that time, had they?

A No, sir.

Q I mean, so far as the people on the platform.

A No, sir.

Q Which one was that, sir?

A Otis Stephens.

Q Now, had Mr. Reynolds picked out, or had he conveyed to you, or anyone in your presence a message that he had identified the second one, that is the Defendant Coleman, prior to the time they made that statement, "Get down into the woods"?

A I don't recall as to when it was, as to whether it was before.

[fol. 55] Q You don't recall if it was before or afterwards?

A No, sir.

Q But you do recall that Stephens had been identified by Reynolds prior to the time any one of the six men on the stage said anything?

A Yes, sir, as they walked to their positions.

THE COURT: Let's see, did he ever identify Coleman there in that line-up you are talking about?

A Yes, sir.

THE COURT: Did you question him about that?

MR. TARTER: Yes, sir.

THE COURT: Let's see, Reynolds identified Coleman, and was Coleman the one you said you didn't know whether he was identified before Coleman made that statement, or afterwards?

A Coleman was the one referred to.

THE COURT: He definitely identified Reynolds prior to the time Reynolds made a statement?

MR. MCDONALD: Stephens, Judge.

THE COURT: Yes, sir, Stephens. I am getting it straight, now.

Q Mr. Hart—

A Yes, sir.

Q —do you have any notes in your possession that might refresh your recollection whether this statement was said or was not said and whether it was said or was not said before Coleman was picked out by Mr. Reynolds?

A A statement about the woods?

Q Yes, sir.

A No, sir, I don't.

Q In other words, that is your independent recollection?

A Yes, sir.

* * * *

[fol. 57] FEBRUARY 24, 1967

PROCEEDINGS RECONVENED PURSUANT TO ADJOURNMENT

THE COURT: Chuck, we will go ahead with this rebuttal testimony, and then remind me and we will get that in the record.

MR. TARTER: Yes, sir.

REBUTTAL EVIDENCE ON BEHALF OF THE STATE

MR. MCDONALD: Mr. Reynolds, please.

CASEY FRANK REYNOLDS, called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (BY MR. MCDONALD:) What is your name, Mr. Reynolds?

A Casey F. Reynolds.

Q And where do you live?

A 2137 Ivy Lane.

Q Mr. Reynolds, you are one of the two parties that —one of the several parties that were involved in an incident out on Green Springs Highway, back on July 24, 1966, wherein you got shot?

A Yes, sir.

Q Now, sometime subsequent to that, did you have occasion to go to the City Jail?

A Yes, sir.

[fol. 58] Q Now, when you were in the City Jail, did you have occasion to go to what is referred to as a line-up room?

A Yes, sir.

Q Now, I will ask you this:

Prior to your going to the line-up room, did you see—after the night on the Green Springs Road, on July 24, 1966, and prior to going to the line-up room, had you seen either of these two Defendants, that is, Otis Stephens and/or John Henry Coleman?

A No, sir.

Q Now, did you see them on that occasion when you were in the line-up room?

A Yes, sir.

Q What was the first occasion of your seeing Otis Stephens? Where was he when you first saw him?

A As soon as he stepped inside the door—I hadn't seen him previous to then until he stepped inside the door, and I recognized him.

THE COURT: Inside the door onto the stage?

A Yes, sir. Just as soon as he stepped up on the stage, I said, "That man, there, is the one; he is the one that shot me."

THE COURT: When was that?

A One Saturday morning.

Q Did you mention that number to the detective?

A Yes, sir.

Q You don't remember the date you went over there, do you?

A No, sir.

Q Have you been over to a line-up to observe these two Defendant on any other dates, or any occasion, than the one time?

[fol. 59] A No, sir.

Q Have you ever been inside any line-up room in any city jail at any time before that?

A No, sir.

Q That is the only time?

A Yes, sir.

Q Now, have you seen either Otis Stephens, or John Henry Coleman, handcuffed any time prior to then?

A No, sir.

Q Have you seen them behind any bars?

A No, sir.

Q Have you seen them in the hall of the City Jail, or anywhere else in custody?

A No, sir.

Q Had any detective said anything to you about either of these two Defendants, that is, John Henry Coleman and Otis Stephens, about their identification, or suggest who they might be, before you went into the line-up room or any time?

A No, sir.

Q Were you seated, or standing, when they came in the line-up room?

A I believe I was sitting on a table, in a casual manner, as close to the partition as I could get, to make sure.

Q Did you pick out John Henry Coleman immediately, such as you had done Otis Stephens?

A Not immediately, because I was looking at Otis Stephens.

Q Had they gotten into their positions before any identification was made?

A Yes, sir.

Q Did you identify John Henry Coleman as being one of the men that was out there on Green Springs Highway on the occasion you got shot?

[fol. 60] A Yes, sir.

Q Prior to the time you had identified John Henry Coleman, had John Henry Coleman said anything—forgetting that night on the Green Springs Highway, but there in the City Jail had John Henry Coleman said anything to you or the detectives, or anybody else?

A I don't think so, not to my recollection of the happening.

Q Did you make a request of the detectives while you were in there?

A Yes, sir.

Q Would you tell His Honor what that was, sir?

A I asked the detectives to ask the people in the line-up—as soon as John Henry Coleman stepped up, when I saw him up there, at that time I asked him to make those people say, "Get in the woods. Get in the woods," and they didn't make them say that. They said they couldn't do that.

Q Do you remember which detective you had any conversation with?

A I thought about it. It had to be, I believe, Mr. Limbaugh, because Mr. Limbaugh was in there with me, and I think the other gentleman had gone in the room to get the other Defendants. He was writing the names down of the people in the line-up.

Q This has been your only time at a line-up, to identify anybody?

A On any occasion, for any reason.

Q Do you remember when we adjourned yesterday afternoon?

A Yes, sir.

Q Did I come out and talk to you about this?

A Both lawyers did.

[fol. 61] Q Did I come out before or after Mr. Tarter came out?

A After Mr. Tarter.

MR. TARTER: We object.

THE COURT: Overrule.

MR. TARTER: We except.

Q Did Mr. Tarter ask you, substantially what I asked you, the subject matter about what you had been testifying about on the stand?

A Yes, sir.

THE COURT: What is the materiality of this, since there was an objection?

MR. MCDONALD: Actually, Judge, it was kind of awkward yesterday afternoon, and I was afraid of the

record when Mr. Tarter said he was through, except for the argument, and I don't have a guilt complex, but—

THE COURT: You thought—you don't want it to appear from the record you may have talked to this witness and refreshed him?

MR. MCDONALD: Yes, sir.

THE WITNESS: I told both of them the same thing.

Q You told Mr. Tarter that yesterday afternoon?

A Yes, sir.

Q Was that before or after I talked to you?

A Before.

MR. MCDONALD: That's all.

CROSS-EXAMINATION

Q (BY MR. TARTER:) Mr. Reynolds, let me ask you:

You told Detective Fordham, at the hospital, on July 25, 1966, that the description of the individuals who had assailed you—that they were Negro boys, about the same [fol. 62] height, about the same age?

MR. WILKINSON: We object to that. This is not relevant.

THE WITNESS: Can I make one statement?

THE COURT: Wait a minute.

MR. TARTER: If your Honor please—

THE COURT: I am trying to separate these. You all wait until I can separate these things in my mind. I am being a little slow with this.

I am going to sustain the objection. We are concerned here with the question of this line-up.

MR. TARTER: All right, sir, we except.

Q Then, I will ask you whether or not, on August 10, in the Sheriff's office, you told Detective Fordham, along with other detectives, that you had some sort of vague—

MR. WILKINSON: Same objection.

MR. TARTER: Let me finish my question.

Q —that you had some sort of vague recollection of what the people looked like, but you didn't believe that you could identify them?

MR. WILKINSON: Same objection.

THE COURT: I sustain the objection.

MR. TARTER: We except.

Q Let me ask you whether or not someone called you and asked you to meet them at the City Jail.

A Yes, sir.

Q Did they identify themselves as being a city detective?

A Not to my knowledge. I don't remember much about it. I was just at work, and they called over there and asked me to meet them at such and such a time.

Q You don't remember whether or not they told you [fol. 63] whether or not they have the boys that shot you, or not?

A I don't know, but I took this point for granted, because I haven't been involved in any other type of incident.

Q Do you know whether or not they told you that?

A They didn't, to my knowledge, tell me that. The only point I remember, they told me to meet them at the City Jail at 11:00 o'clock, or 12:00 o'clock, whatever time it was.

Q You don't remember what other conversation took place?

A Yes, sir.

Q Then you went to the City Jail at that time?

A Yes, sir. I left immediately.

Q And when you got to the City Jail, you say when Otis Stevens immediately stepped up on the stage you recognized him, is that right?

A When I was in the room, I recognized him as soon as he stepped up on the stage and I saw his face.

Q I will ask you whether or not you saw many pictures prior to that time?

MR. MCDONALD: I object to that.

THE COURT: I think you are getting into the question of questioning the identification rather than the fact that he made an identification, aren't you, Charles?

MR. TARTER: What I am trying to show—I am sure I can show it, but I am trying to show that this man said that, on at least two occasions, he couldn't identify them, and, then, I am trying to show the officers

called him and asked him to come to the lineup, and he didn't remember what they told him, except to meet them at the City Jail, and when he goes into the City Jail and immediately recognizes one of the individuals involved in this, and I am thinking, possibly, he might have been given some help, not intentionally, that two or three of the men that were involved were in this lineup.

[fol. 64] Sometimes an officer will take what he assumes to be true and run with it, so to speak.

THE COURT: All right, go ahead.

Q Mr. Reynolds, you say—repeating myself, but you said you recognized Otis Stephens right off?

A Yes, sir.

Q After they all got on the stage, then you turned around to an officer and said, "Make them say, 'Get down in the woods,'" or something to that effect, is that right?

A Not at that time.

Q All right. And I will ask you if it isn't a fact that all six of them did step forward and say, "Get down in the woods"?

A It is a fact that they didn't.

Q It is a fact that they didn't?

A That's right.

Q I will ask you whether or not they made John Henry Coleman—I will ask you if John Henry Coleman had a hat on him?

MR. MCDONALD: We object to that. We are still getting down to something—he can test his identification at the time of the trial, but this goes directly to the point of whether this man uttered some words.

MR. TARTER: This is a point in the Wade case, the fact that they made the defendant make other gestures other than just saying words or standing there.

THE COURT: Overrule.

Q I will ask you whether or not you remember whether or not John Henry Coleman had a hat on him?

A I believe John Henry Coleman had on a hat, and he had it pulled down over his eyes.

Q I will ask you whether or not they made John [fol. 65] Henry Coleman step forward and move his hat to the back part of his head and move it forward to the front part of his head again?

A I asked them to make John Henry Coleman to take his hat off, or move it back, because I remembered on the night of the incident he was wearing a hat.

Q The question is, did he do it?

A I believe John Henry Coleman was made to move his hat.

Q You did not identify John Henry Coleman at that time?

A I had not stated the identification.

THE COURT: Did you say "move his hat"?

A He had the hat on in a different manner than the way he was wearing the hat.

THE COURT: When he changed the hat from down over his eyes, did he take it off, or push it back over his head?

A At first he pushed it back, and then he took it off.

Q After some instructions to do so, is that right?

A Yes, sir, I think so.

Q After that you made your identification?

A I stated my identification. When he had stepped up—

Q Just answer my question.

MR. MCDONALD: I believe he is answering it.

Q I will ask you if you had made your identification?

A I had made my identification previous to that.

Q But you hadn't told anybody?

A I had stated my identification.

Q Before you stated your identification, you asked them to have him move his hat, is that right?

A Yes, sir.

Q After you said you recognized Otis Stephens, you still asked them to please make them step forward and say, "Get down in the woods," is that right?

[fol. 66] A In the—

Q Yes, or no?

A Yes.

Q All right—

THE COURT: What was that last question, Jimmy?

(Thereupon, the court reporter read as follows: "After you said you recognized Otis Stephens, you

still asked them to please make them step forward and say, 'Get down in the wood,' is that right?")

THE WITNESS: I did not ask them to say—to make all of them say that. I asked them to make John Henry Coleman say that.

Q But all six of them stepped forward and did it; is that right?

A None of them did it.

Q None of them did it?

A None of them said, "Get in the woods," or "Take me in the woods," or—

Q I will ask you whether or not anyone has talked to you this morning about testifying?

A No, sir.

Q About what you knew about this?

A No, sir.

Q You were not talked to yesterday afternoon?

A You did, sir, and when Mr. McDonald came out he asked me if anyone had talked to me, and I told him what you had asked me, and I told him the same answers I had given you.

Q All right. Do you remember me asking you when you identified Otis Stephens?

A Yes, sir, I believe I do.

Q Do you remember telling me you identified him as [fol. 67] he walked up on the stage?

A Yes, sir, as he stepped up.

Q And do you remember that being the entire extent of my talking to you in the hall?

A You had asked about them calling me over there, whether they had called me.

Q And that's all?

A Just that short line of questioning.

Q Then Mr. MacDonald talked to you, is that right?

A Yes, sir.

Q Did he tell you what the purpose of this questioning was, involving identification?

A No, sir, just that he asked me if anyone had talked to me, and I told him you had, and I told him the point of conversation, and he turned around and walked off,

and I believe was talking to the other gentlemen at the time. I don't know what they said, but I was not involved in their conversation.

Q Did you hear what they said?

A No, sir.

Q Did he ask you anything about the statements of Stephens?

A I don't think so, sir.

Q You don't think so. Are you sure?

A Yes, sir.

Q All right. And I will ask you whether or not he asked you anything about the hat on John Henry Coleman?

A No, sir, he didn't.

MR. TARTER: That's all.

MR. MCDONALD: You may step down.

MR. TARTER: I have one further question:

Q (BY MR. TARTER:) You said that Detective [fol. 68] Limbaugh was the one that handled the lineup with you, is that right?

A He did not. He was on the mike and told them to step up and turn left and turn right and step back.

Q Was Detective Hart with you, also?

A Detective Hart, I believe he was there at the beginning, and then the other gentleman from the City Jail was in there. There was four of us in there.

MR. TARTER: We can't hear you.

THE WITNESS: There were four of us in there, and then Mr. Hart went up on the stage, and he was writing the names down. He said he had to get the information down on who was in the lineup and their descriptions, and then Mr. Limbaugh and the other gentleman and I were left in the room when Mr. Hart went up on the stage and wrote their names down.

Q Was this before or after your identification?

A I don't remember. I had already identified Otis Stephe , I am sure, and I believe it was during the time —I just don't remember when it was. I know he went up on the stage.

After I identified these other two, they asked me if I recognized anybody else there, and I said I did not, and

I said that the other fellow that was out there was—that the other man was about the size of those two, and this was the only further identification I had made.

Q And Mr. Hart was up on the stage while you were making this identification?

A I don't know, sir. I don't know when Mr. Hart went up on the stage, sir.

MR. TARTER: That's all.

MR. MCDONALD: That's all.

(Witness Excused)

[fol. 69] MR. MCDONALD: Mr. Limbaugh, please.

MR. CARL LIMBAUGH, called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (BY MR. MCDONALD:) What is your name, please, sir?

A Carl Limbaugh.

Q Mr. Limbaugh, did you have occasion to be involved in the cases of the State of Alabama against Otis Stephens and John Henry Coleman?

A Yes, sir.

Q Did you have occasion to be in the lineup room, of the City Jail, in the City of Birmingham, when Mr. Reynolds was viewing a lineup held?

A Yes, sir, I was.

Q Do you recall the date?

A Yes, sir.

Q When was that, sir?

A October 1st.

Q Do you recall the time, or the approximate time?

A Around midday.

Q Did Mr. Reynolds make identification of Otis Stephens and of John Henry Coleman on that occasion?

A Yes, sir.

Q Was it both of them, or one of them, or what?

A Both defendants.

Q Who was in the room with Mr. Reynolds when he made the identification?

A To the best of my knowledge, Mr. Reynolds was in there with Vernon Hart and myself.

MR. TARTER: Detective Vernon Hart?

[fol. 70] A Yes, sir.

Q Do you recall whether Warden Ambrose was in there, or not?

A Yes, sir, Warden Ambrose was in there.

MR. TARTER: We object to him leading.

THE COURT: All we need to know is who was there. I don't think we need to distrust Mr. McDonald. We haven't got a jury in the box.

MR. TARTER: All right. We except.

Q Do you remember Mr. Reynolds making any request of either Mr. Hart or Mr. Ambrose, or you, or anybody else, that was in there, concerning having the people on the stage do something or say something, or anything of that nature?

A Yes, sir. He made a request.

Q What was that request?

A He wanted a defendant to say, "Take her to the woods."

Q Which one was that?

A It would be Otis Stephens.

Q Did Otis Stephens, or John Henry Coleman, make that statement at all, or did you make a response, or anybody make a response to Mr. Reynolds when he made that request?

A Well, actually, Otis Stephens was in No. 1. He wanted to start with No. 1. Actually, he wanted to go down the lineup, I presume. I didn't know what was in his mind. I told him that the audio end was distorted, and I didn't think it would be fair to ask them that.

Q Did you ask them to do it?

A No, sir.

Q Did anybody ask them to do it?

A No, sir, not in my presence.

Q Did they do it while you were there?

A No, sir.

[fol. 71] Q And I believe you said Mr. Reynolds identified both of them?

A Yes, sir.

Q Was that while you were there?
A Yes, sir.
Q And, during that time, I believe you said none of them stepped forward and said, "Get in the woods," or anything?
A No, sir.
MR. MC DONALD: That's all.
THE COURT: Were you there during the entire procedure of the lineup?
A Yes, sir.
THE COURT: All right.

CROSS EXAMINATION

Q (BY MR. TARTER:) Mr. Limbaugh, when was that lineup held?
A October 1st.
Q October 1st?
A Yes, sir.
Q How many lineups had you been involved in since October 1st, would you say?
A I don't think I have been involved in any.
Q You don't think you have been involved in any?
A Not to the best of my knowledge.
Q You have an independent recollection of this lineup?
A Yes, sir.
Q You do? All right. Now, assuming that Detective Hart testified that all of the people on that stage stepped forward and said, "Get down in the woods," or something to that effect, in your judgment, would he be mistaken?
MR. WILKINSON: We object to the question. It is an [fol. 72] hypothetical question.
THE COURT: Sustain.
MR. TARTER: We except.
Q You remember distinctly that they did not step forward and say these words?
A Not in my presence, no, sir.
Q Did you arrive with Detective Hart on that day?
A Yes, sir, I did.
Q You did?
A Yes, sir.

Q You did not meet him inside?
A No, sir.
Q Did he ride in the same car with you?
A Yes, sir. I picked him up at his home.
Q Do you remember John Henry Coleman, whether or not he had a hat on?
A Yes, sir, I think he had a hat on, to the best of my knowledge.
Q Do you remember John Henry Coleman being told to take his hat and sit it on the back of his head and then remove it?
A Yes, sir.
Q Did he do that?
A Yes, sir.
Q And he did request that Otis Stevens step forward and say, "Take her to the woods," or "Get down to the woods," or something to that effect?
A To the best of my knowledge—
Q Did he ask No. 1 and the rest of them too?
A Yes, sir, he asked to have them step forward. He asked to have No. 1 step forward, and it was declined because the audio was bad.
MR. TARTER: That's all.
MR. MC DONALD: That's all.

(Witness Excused)

THE COURT: On this point, is there something else, Chuck?
MR. TARTER: No, sir.
THE COURT: Mr. Tarter has made it known to the Court that he has subpoenaed certain witnesses here, who are attorneys, among who are Mr. William B. McCollough, and Drew Redden, and who are the others?
MR. TARTER: Roderick Beddow, Jr.
THE COURT: Roderick Beddow, Jr. All of who are competent and qualified criminal lawyers practicing at the Bar, and they have practiced here a good number of years, and Mr. Tarter desires to show by their testimony, as I understand it—he wants to offer their testimony to the effect that a preliminary hearing was an important stage in the processing and handling of a criminal matter, from

the standpoint of defense, particularly with respect to the defense using the preliminary hearing as a discovery.

Is that everything?

MR. TARTER: Several other points, too.

THE COURT: You go ahead and get the other points in.

MR. TARTER: Even though Your Honor considers anything that was said—this will have to be part of my showing—even though Your Honors considers anything said, any point, or anything, in the preliminary hearing, wouldn't be admissible in this court, during the course of the actual trial, itself, there are at least two other criminal court judges, criminal division judges of this Circuit Court here in this courthouse who try criminal cases.

[fol. 74] THE COURT: Chuck, let me say this: I don't think—let's don't get off on a personality thing at all, because I think what you got involved is a point of law, and that is either the law or it isn't, and that is that if a defendant, at a preliminary hearing, was not represented by counsel and makes an incriminating, or inculpatory statement, that it is either admissible or is not admissible. It is a point of law. I don't think we could speculate how the three judges would construe it.

It is my construction of law that that would not be admissible under those circumstances.

I think this has to be based on whether that is the law or not the law and not whether one of the three of us won't construe the law that way.

Do you see what I am getting at?

MR. TARTER: Yes, sir. And, further, that the attorneys would testify that the preliminary hearing is a vital stage of evidence culminating in the trial of the defendant, in that in that particular hearing that the defendant has a right to examine and cross-examine all witnesses that appear against him or who are subpoenaed by the State or are against the defendant, in an effort to discover what their testimony would be and what evidence the State has made against the defendants, and it is a critical stage in the process aforementioned, in that in that stage testimony is elicited from witnesses, various prosecuting witnesses, in order to determine whether or

not there is probable cause to bind the defendant over to the Grand Jury, and that the defendant is brought into open court separately and with—and usually in handcuffs, usually in full view of the proceedings, and normally with a considerable length of time elapsing before testimony is begun.

[fol. 75] Oftentimes highly complex and complicated legal knowledge is required of a person appearing in that court, in order to determine whether or not the evidence that is elicited is good and valid evidence and admissible evidence against the defendant.

Further, that on many occasions the defendant is able, with the assistance of counsel, to elicit from the prosecuting witnesses statements under oath which are extremely advantageous to the defendant in the preparation of his case, and in the sense that it commits the witnesses to definite testimony or a definite story, and it is highly advantageous for a defendant to have counsel present at the preliminary hearing.

And it is absolutely necessary that counsel be present not only in some instances but in all occasions where a defendant is charged with a felony from which he may be bound over to the Grand Jury as a result of the testimony presented in that forum.

Now, Judge—

THE COURT: Let me ask you this:

Was a preliminary held down there, or were these waived over to the Grand Jury?

MR. TARTER: A preliminary was held.

THE COURT: All right. A preliminary was held?

MR. TARTER: Yes, sir. I don't know how many witnesses were brought forward or what witnesses were brought forward; and I don't know whether the fact that these defendants made statements was admitted, causing them to be bound over to the Grand Jury.

THE COURT: So that we don't get involved in a long proof question here, can we stipulate that subsequent to that time and prior to the date of the filing of these motions we are now hearing that the men were indicted by the [fol. 76] Grand Jury on these charges?

MR. TARTER: Yes, sir.

THE COURT: And that those indictments are now pending?

MR. TARTER: Yes, sir. And we would further state that irreparable harm has come to these defendants by virtue of their not having counsel present at the preliminary hearing.

MR. MCDONALD: Are you testifying what they would testify to?

MR. TARTER: Yes, sir, in the sense that—

THE COURT: I was wondering awhile ago—you use the word "absolutely"—

MR. TARTER: All four of us feel that way about it, and this would be our opinion, for whatever it is worth.

THE COURT: Jimmy, would you read that last statement back?

> (Thereupon, the court reporter read as follows: "Yes, sir. And we would further state that irreparable harm has come to these defendants by virtue of their not having counsel present at the preliminary hearing.")

MR. TARTER: That would be the extent of the statement there, Judge.

We also wanted to make a showing from these records that we subpoenaed. We would show by these subpoenaes that more than ninety-five percent of all the cases indicted, or heard, by the Grand Jury, whether they were indicted or not indicted, came to the Grand Jury as a result of their being bound over from the preliminary hearing.

We are saying that better than ninety-five precent of all defendants have an opportunity for a preliminary hearing in this county.

THE COURT: Since you are on that question, you do [fol. 77] not contend that the Alabama law, as it stands today, doesn't give a Grand Jury an authority to indict for a felony without the case having come through preliminary court?

MR. TARTER: No, sir, but we do contend that better than ninety-five percent of all cases that go before the Grand Jury come from a preliminary hearing.

THE COURT: All right. Let me take over, here:

The defense have made known to the Court that they propose to offer that line of testimony, and, it being made —and for that purpose—and it being made known to the Court by the State that they intended to object to that testimony, the Court suggested that they offer to show those things that Mr. Tarter just stated, to support the point he just made, and the Court stated it would sustain the objection to the complete line of testimony, and, for that reason, it wouldn't be material and it wouldn't be necessary in order to get it in the record and in order to take advantage of whatever evidence there might be in having it in the record.

And it wouldn't be necessary to bring these lawyers in here to testify, since I was going to rule out the evidence anyway, on objection, and that is where we are right now.

MR. TARTER: May I approach the bench?

THE COURT: And, so, I do—

MR. MCDONALD: We do object, Your Honor.

THE COURT: I do rule that that line of evidence is not admissible on his motion.

Yes, sir?

(Thereupon, ensued an off-the-record discussion, following which the following proceedings were had and done:)

[fol. 78] MR. TARTER: We—

THE COURT: Rusty, we are getting a little bit—Jimmy is going to have some problems with this record.

On the basis of rebuttal testimony, you placed on the stand this morning Mr. Reynolds and Mr. Limbaugh, and the defense desires to place both of these movants on the witness stand for the limited purpose of entering into the record their testimony as to whether or not they were caused to say these things over there, and he may do that at this time.

MR. MCDONALD: Yes, sir.

MR. TARTER: I call Otis Stephens.

THE COURT: Come around, Stephens.

EVIDENCE ON BEHALF OF THE MOVANTS

OTIS STEPHENS, called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (BY MR. TARTER:) Would you state your name and address?

A Otis Stephens, 2819—Third Alley, South.

Q I will ask you whether or not you are the defendant in one of these causes which we are trying at this present time?

A Yes, sir.

Q Otis, I will ask you if you remember being in a line-up in October, 1966?

A Yes, sir.

Q In connection with this case?

A Yes, sir.

Q I will ask you, after you were on the stage in that lineup, whether or not you were asked to say anything?

[fol. 79] A Yes, sir.

Q And what were you asked to say?

A He asked me to state my name and my age and how old I was and how much I weighed and told me to say, "Get in the woods."

Q And did you step forward and say those things?

A Yes, sir.

Q You did?

A Yes, sir.

Q Was that after you were on the stage?

A Yes, sir.

Q I will ask you whether or not you knew anybody else in the lineup?

A John Coleman and John Hodge.

Q I will ask you whether or not they were asked—told to do the same thing?

A Yes, sir.

Q I will ask you whether or not they did do the same thing?

A Yes, sir.

MR. TARTER: All right. That's all.

CROSS EXAMINATION

Q (BY MR. MCDONALD:) Now, I believe your testimony is this:

That after you were on the stage you were asked certain questions. I will go into them later. How much time, in your judgment, had elapsed from the time you went into the stage before you were asked these things?

A About two minutes.

Q About two minutes?

A Yes, sir.

Q And you were asked to say what, now?

[fol. 80] A State my name and where I lived and how much I weighed, how tall I am and how old I am and "Get in the woods."

Q How tall you are?

A Yes, sir.

Q And your weight?

A Yes, sir.

Q And, "Get into the woods"?

A Yes, sir.

Q And you said all of those things?

A Yes, sir.

Q And that was the only time that you said anything from that stage, is that right?

A Yes, sir.

Q Do you know who asked you to say that?

A No, sir.

Q Did you see anybody there on that occasion?

A From the stage?

Q Yes.

A No, sir, you couldn't see through the glass.

Q Did Mr. Hart come up and take your name down and your age and your weight and your height?

Did he come up there and measure you against that back thing there?

A No, sir.

Q You say he didn't come up there at all?

A Not Mr. Hart. It was Mr. Woodrow, I think.

Q Did he have on a uniform?

A Yes, sir.

Q What kind of uniform did he have on?
A A city. He was a City Warden.
Q And you say Mr. Hart did not come back there?
A No, sir.
[fol. 81] Q But Mr. Woodrow did?
A Yes, sir.
Q And it was after Mr. Woodrow had gotten on the stage with you that you all said these things, is that right?
A I said the things before he come on the stage.
Q You said the things before he came on the stage?
A Yes, sir.
Q Up until this time, you hadn't seen anybody on the stage with you?
A No, sir.
Q It was just the six of you, or five—
A Six.
Q Did John Henry Coleman say the same things, answer the same questions you did?
A Yes, sir.
Q And said, "Get down in the woods"?
A Yes, sir.
Q And the age and weight and height?
A Yes, sir, he did.
Q And name. You just said, "Get down in the woods," one time?
A I said it once, and then I stepped back, and after he asked John Coleman and John Hodge he come back to me and told me to say it again.
Q And didn't you say all six of you said it?
A No, sir, just three, me and John Coleman and John Hodge.
Q Just the three of you?
A Yes, sir.
Q And he didn't ask this question of the other three?
A No, sir.
Q And you three are co-defendants, or defendants, in [fol. 82] this same matter?
A Yes, sir.
Q You know that to be a fact, don't you?
A Yes, sir.
Q Now, you didn't hear any conversation on the other side of the glass, did you?

A No, sir.
Q What were you wearing on that occasion?
A I had on a yellow jersey and a black pair of trousers.
Q Did you have a cap on?
A No, sir.
Q What was John Henry Coleman wearing on that occasion?
MR. TARTER: I object, if Your Honor please. It goes into the same thing they tried to keep me from going into.
THE COURT: Let's find out about the hat.
MR. TARTER: We except.
Q What was he wearing on that occasion?
MR. TARTER: We object, if Your Honor please. He is not asking if he had a hat on. He is asking what he was wearing.
THE COURT: I may be entirely wrong, but my recollection is that you questioned one of the officers about what these men had on. That is my recollection.
MR. TARTER: We except, Your Honor.
THE COURT: I can be wrong. I will overrule, but that is my recollection.
Q What did John Henry Coleman have on?
A A beige hat and a black pair of trousers and a blue shirt.
Q Do you remember, when he went in the lineup, if he had a hat on his head, or on the side of his head, or over his eyes, or how?
[fol. 83] A The way he wears it always, on the back.
Q That is when you went in there?
A Yes, sir.
Q And that is when you came out, is that right?
A Yes, sir.
MR. MCDONALD: That's all.

REDIRECT EXAMINATION

Q (BY MR. TARTER:) Did they ask John Henry Coleman to take his hat and move it forward and move it backwards?
A Yes, sir, they told him to move it forward.
Q Did they ask him to move it back again?

A Yes, sir.
MR. TARTER: That's all.

RECROSS EXAMINATION

Q (BY MR. MCDONALD:) When he told him to move it forward and back, that is after you and John Henry Coleman and Hodge had given your name and age and height and were told to say, "Get in the woods"?
A He was the next man that he told to step forward, and after he gave his statement he told him to move his hat backwards and forward.
Q That was after he made that statement?
A Yes, sir.
MR. MCDONALD: That's all.
MR. TARTER: That's all.

(Witness Excused)

MR. TARTER: John Coleman.
JOHN HENRY COLEMAN, called as a witness, being first duly sworn, was examined and testified as follows:

[fol. 84] DIRECT EXAMINATION

Q (BY MR. TARTER:) Would you state your name and address?
A John Henry Coleman, 517 Short 32nd Street, South.
Q John, I will ask you whether or not you are the defendant in one of these cases which we are trying today?
A Yes, sir.
Q I will ask you whether or not you appeared in a lineup in connection with this case sometime during the month of October, 1966?
A Yes, sir.
Q And, I will ask you whether or not, after you got on the stage in the lineup—was this lineup in the City Jail?
A Yes, sir.
Q After you got on the stage, whether or not someone told you and Otis Stevens and John Hodge to step forward and make a statement?

A Yes, sir.

Q And what were you told to say?

A I was told to state my name, the first thing, how old I was, my address, my height, and weight.

Q And were you told to say anything else?

A Yes, sir. They told me to walk forward and turn around and facing them again and let my hat go backward and forwards on my head.

Q Did they tell you to say, "Get down in the woods," or something to that effect?

A Yes, sir.

Q I will ask you whether or not that was told to No. 1, which was Otis Stephens, and No. 3, you, and whatever number John Hodge was?

A They told us three.

[fol. 85] Q Did they call you by number, or name?

A By number.

Q And Otis Stephens was No. 1?

A Yes, sir, I think so.

Q Do you know what number John Hodge was?

A He was up above me.

Q All right. I will ask you whether or not, after Otis Stephens stepped forward and said exactly what you have said and the others went on down the line, you and John Hodge, did they go back to Otis Stephens and ask him to step forward and say it again?

Did they make him step forward again and say, "Get down in the woods" again?

MR. MCDONALD: We object to that as leading.

THE COURT: Sustain.

Q Did they make him step forward again and say anything else?

A After he stepped forward the first time, I don't remember if he said anything else, or not.

Q How long after you got on the stage did they ask you to do this?

A I guess, somewhere around four or five minutes before they got to me.

Q Got to you?

A Yes.

MR. TARTER: Your witness.

CROSS EXAMINATION

Q (BY MR. MCDONALD:) Now, you were number what in the lineup?

A Three.

Q No. 3?

[fol. 86] A Yes, sir.

Q And was a man between you and Otis Stephens?

A Yes, sir.

Q Who was he?

A I don't know, sir.

Q Do you know—

A I think his name was Tommy Barnett.

Q And John Hodge was what number?

A He was above me. I can't remember what number he was.

Q He wasn't next to you, was he?

A I don't know, sir.

Q Now, these questions that you say that somebody asked you and these answers that you just gave, about your name, height, weight and address, move backward and forward, and move the cap back on your head, or forward on your head, and say these words, "Get back in the woods," or something like that, those things were just said one time by you, is that right?

A By me, yes, sir.

Q And, to your knowledge, they were just said just one time by anybody else on that stand, is that right?

A To my knowledge, yes, sir.

Q And this was just some four or five minutes after you had become stationary on the stage, is that right?

A Yes, sir.

Q And this was after some detective, or officer, was on the stage getting your name and address and weight and height and other measurements, is that right?

A Yes, sir. They had already gotten my name and address.

Q Who was that that came on the stage?

A Some policeman.

[fol. 87] Q You say he was in uniform?

A Yes, sir.

Q I am talking about uniform, as opposed to street dress, like detectives have used in coming to the courtroom.

A Not those kind of clothes.

Q A blue uniform?

A Yes, sir.

Q Is it your testimony that Detective Hart did, or did not, come behind the glass partition?

A He did not come behind there.

Q He never did ask you any questions?

A Not while in the lineup.

Q And he never wrote down anything on a piece of paper when he came back there and talked to you?

A Came back where?

MR. MCDONALD: I withdraw that.

Q The man that did come back, that you don't know the identity of, did he have a piece of paper in his hands and write down things as you said them?

A I think he did.

Q All right. And as he looked at your height and you said your height and weight, he wrote something down on a piece of paper?

A Yes, sir.

Q Could you see what he was writing down?

A No, sir.

Q And he went down all six, and, as he talked to each one individually, he wrote those things down, didn't he?

A Yes, sir, the ones he talked to, I think he did.

Q And there was only one man that did that?

A Yes, sir.

Q And there was only one man that came behind there and there was only one man that did any writing, is that right?

[fol. 88] A Yes, sir.

Q And it was after this time that you were asked to say, "Get in the woods," is that right?

A When he did this writing? It was afterwards.

Q You were asked to say, "Get in the woods" after he did the writing?

A It was before.

Q In your judgment, how long had you been there before the officer came behind the glass?

A I had been talked to; I had been there long enough to do the talking that they asked me to do.

Q You did what they asked you to do before he came on the stage?

A Yes, sir.

Q All right. And it was four or five minutes, I believe, before you said your name, age, address and weight and height, and the words, "Get back in the woods,"—wait a minute.

You had already said these things before the officer came there?

A Yes, sir.

Q All right. How much longer after you had said these things was it that whoever did the writing came back there, in your judgment?

A I don't know. I reckon it was about ten or twelve minutes, because we could hear him talking. We couldn't see him.

Q Ten or twelve minutes, in all?

A Yes, sir.

Q And did you leave the lineup, or stage where the lineup was held, immediately after everybody got through saying these things?

A No, sir. After everybody got through saying these [fol. 89] things is when the man came around with the little old paper.

Q Only three of you stepped forward and said these things you testified about, is that right?

A Yes, sir.

Q But he talked to all six of you, didn't he?

A I don't think he did.

Q He just talked to three of you?

A Yes, sir.

Q And are you sure about that?

A I am pretty sure he did.

Q And he just wrote in front of just the three of you and did not write in front of the other three?

A No, sir.

Q And this writing we are talking about was during the time he was questioning you back there?

A Yes, sir.

Q And, then, after he got through doing that to the three of you, did you leave the stage then?

A Yes, sir.

Q Immediately?

A Yes, sir.

Q Now, I asked you a question, and I think we got off on another answer.

Was there any time that elapsed between the time that John Hodges, who you said was the last one to give this information you testified about—was there any time elapsed between the time he got through giving his information and the time that the officer came on to the stage?

A There wasn't nothing happened, but when they put me back in my spot he got right on John Hodges then.

Q And then he asked John Hodge the same questions?

[fol. 90] A The same questions he asked me.

Q And he said the same thing you did?

A Except he mentioned his hat. He didn't have on a hat.

Q At the time John Hodge got through saying, "Get into the woods," was the officer on the stage then?

A No, sir.

Q From that point until the time that the officer came on the stage, in your judgment, how much time had expired?

A About two or three minutes, I guess.

MR. MCDONALD: Okay. That's all.

MR. TARTER: You can come down.

THE COURT: All right.

(Witness Excused)

MR. TARTER: I think that's all we have, Judge.

THE COURT: All right. Anything else from the State? Have you all got anything else?

MR. MCDONALD: No, sir.

(THE FOREGOING WAS ALL THE EVIDENCE IN THIS CAUSE.)

* * * *

(Following the arguments of counsel on both sides, proceedings were adjourned at 11:28 a.m., February 24, 1967.)

* * * *

[fol. 1] IN THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR JEFFERSON COUNTY, ALABAMA

Case Number 13635

STATE OF ALABAMA, PLAINTIFF

vs.

JOHN HENRY COLEMAN, DEFENDANT

Case Number 13657

STATE OF ALABAMA, PLAINTIFF

vs.

OTIS STEPHENS, DEFENDANT

Transcript of Trial—May 2, 1967

* * * Honorable Wallace C. Gibson, Judge Presiding * * *

APPEARANCES

MR. RUSSELL MCDONALD, Deputy District Attorney, Jefferson County Courthouse, Birmingham, Alabama, for the State.

MR. CHARLES TARTER, Attorney at Law, City Federal Building, Birmingham, Alabama, for the defendants.

* * * *

[fol. 87] MR. TARTER: Call Detective Hart.

VERNON T. HART, called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (BY MR. TARTER:) Detective Hart, I will ask you whether or not you were present at an interview with Frank Reynolds at the hospital, shortly after the incident occurred on July 24, 1966?

A No, I wasn't.

Q I will ask you whether or not you were present on August 10, where some mug shots were shown to them, to Mr. Reynolds, in the sheriff's office?

A No, sir, I had no knowledge of that.

Q I will ask you whether or not you were present at the lineup, which occurred subsequent to the arrest of Otis Stephens and John Coleman?

A Yes, sir, I was.

Q I will ask you what date that occurred?

A That was on Saturday, October 1, 1966.

Q Did you contact Mr. Reynolds, to ask him to come to the lineup?

[fol. 88] A I don't recall that I did.

Q Do you know who did?

A If I remember, Sergeant Limbaugh called me and asked me to go to the City Jail with him. I was under the impression that he had made the arrangements.

Q Sergeant Limbaugh called you?

A Yes, sir, at home.

Q What time was the lineup held?

A It was at 12:30 p.m.

Q How many individuals were in that lineup?

A There were six males.

Q All colored?

A Yes, sir.

Q Do you have the names?

A Yes, sir.

Q Height and weight, and that sort of things?

A Yes, sir.

Q Would you read them, please?

A Yes, sir.

In the No. 1 position of the lineup, Otis Stephens, age eighteen, of 2819 - Third Alley, South; six feet two inches; 173 pounds; was wearing yellow pullover sweater, black pants, black shoes.

No. 2 position: John Mallory; thirty-eight years old; Fraternal Hotel; he was five feet eight inches; 170 pounds; he was wearing a gray short-sleeve shirt, brown pants, and brown shoes.

No. 3 was John David Coleman; twenty-eight; 517 Short 32nd Street, South; five feet four add one-half

inches; 132 pounds; wearing a black sweater with white and gray stripes, worn over a maroon sweater, dark gray pants, black shoes.

No. 4 position was Howard Bonner, Jr.; sixteen years old; weighed 140 pounds; five feet seven inches tall; lived [fol. 89] at 608 Wheeling Street, McDonald's Chapel; wearing a yellow pullover shirt, bluish green pants, and black shoes.

No. 5 was John Hodge, age eighteen. He lived at 3219 Fifth Avenue, South; five feet eleven inches tall; 140 pounds; he was wearing a red, purple, black plaid shirt, and maroon pants and black shoes.

No. 6 was McKinley Henderson; twenty-two years old; of 1417 Avenue I, Ensley; he was six feet tall, 180 pounds; yellow knit shirt, worn over yellow windbreaker, with black pants and black shoes.

Q All right. Now, I will ask you if during the course of that lineup Mr. Reynolds made the request that the individuals be caused to repeat the following words: "Get down in the woods"?

A Yes, sir, he did.

Q Now, I will ask you if he did not make that request with reference to Otis Stephens, John Coleman, and John Hodge?

A Not specifically.

Q But he said all of them?

A He asked us to have them say the words, "Let's take her in the woods," or something to that effect.

Q And that was done, is that right?

A As best I remember, it was. However, there was some discussion between Sergeant Limbaugh and myself.

Q I am not asking that. You testified earlier that it was done by all six of them?

A As best I remember, it was.

Q And John Coleman was not the only one who was made to do it, is that right?

A That is correct.

Q And Mr. Reynolds did not only request that John Coleman solely do it?

[fol. 90] MR. MCDONALD: We object to suggesting.

THE COURT: Sustain the objection. He is your witness.

MR. TARTER: I beg your pardon.

Q I will ask you whether or not he requested that John Coleman do it, solely?

A No, sir.

Q I will ask you whether or not he requested that John Coleman place his hat on the back of his head and then move it forward?

A I don't recall the men wearing hats.

Q You don't remember testifying to that earlier?

A No, sir, I don't.

Q You don't. In your records, there, do you indicate whether or not he was wearing a hat?

A No, sir. It doesn't give any reference to any hat wearing at all.

Q Was Mr. Fordham there?

A No, sir.

Q He was not?

A No, sir.

Q All right. Now, was it after this was done that Casey Frank Reynolds identified John Coleman as being one of the individuals out there on that occasion in July?

A No, sir.

Q I beg your pardon?

A No, sir.

Q When did he identify John Coleman?

A Immediately after identifying Otis Stephens.

Q Are you looking at your notes?

A Yes, sir.

Q Could I see them, please?

A Yes, sir.

[fol. 91] (Thereupon, Mr. Tarter received written instrument, following which the following proceedings were had and done:)

Q Is there something in these notes that indicates which one he identified first?

A No, sir, I don't think so. I will check it. The notes show that Mr. Reynolds stated that No. 1 was one of his assailants on July 24, 1966. This is the first notation, so far as his identification.

Q But there is nothing on there with respect to identifying John Coleman, is there?

MR. MCDONALD: I object to cross-examining his own witness.

THE COURT: Sustain the objection.

Q Is there anything on there to indicate, when he identified John Coleman?

MR. MCDONALD: I still object, may it please the Court. The witness has testified as to when they were identified.

There can only be one reason for this question, and that is to impeach the witness, which is his witness.

THE COURT: I know. I will let him answer. He has already questioned him about the notes, and all.

MR. TARTER: Sir?

THE WITNESS: Repeat the question.

Q Was there anything on there, in the form of notes, to indicate when he identified John Coleman?

A You mean, the exact time of day, or what?

Q I am talking about, in what order?

A Yes, sir. That notation is after it is stated that Otis Stephens was identified (indicating).

Q This notation says that: At 12:30 p.m., Saturday, [fol. 92] October 1, 1966, when six Negro males entered stage at lineup, Mr. Reynolds stated that No. 1 was one of his assailants on July 24, 1966. Also No. 3 was there. "I saw another man there that resembled No. 4 or 5." And it says: "Show-up ended 12:47 p.m."

So, your notes there with respect to No. 3, follows the note with reference to No. 1?

A Yes, sir.

Q But, is there a note there which indicates or which says the order of the identification?

A No, sir, other than the way it is written here, in sequence.

Q From aught appearing in those notes, I will ask you whether or not one could have occurred before the other?

A I don't think so.

Q I will ask you if there is anything there that would indicate otherwise?

MR. MCDONALD: I object to impeaching his own witness.

THE COURT: I sustain the objection. We have gotten into the question of the use of the notes, which is customarily used in cross examination.

You have identified this witness, and he has refreshed his recollection from the notes. You have asked to see them, and now you are examining him on his notes. So, I will sustain the objection. We are getting in pretty deep water.

MR. TARTER: All right, sir. I would like to offer his notes in evidence.

THE COURT: Any objection to them?

MR. MCDONALD: We have no objection.

(Thereupon, the said written instrument was received in evidence and marked by the court reporter [fol. 93] as, "Defendant's Exhibit 1." Said written instrument is set out in words and figures below as follows:)

DEFENDANT'S EXHIBIT 1

"# 1 Otis Stevens 18 2819 - 3 Alley So. 6'2" 173 Yellow pullover sweater—black pants black shoes

2 John Mallory 38 Fraternal Hotel 5'8" 170 Gray short sleeve shirt—brown pants brown shoes

3 John David Coleman 28 517 - Short 32 St. So. 5'4½" 132 lbs Black sweater W/white & gray stripes worn over a maroone sweater—Dark gray pants—black shoes.

4 Howard Bonner, Jr. 16 140 lbs 5'7" 608 Wheeling Street (McDonald's Chapel) yellow pullover shirt—bluish green pants—black shoes

5 John Hodge 18 3219 - 5 Ave So 5'11" 140 lb Red/purple/black plaid shirt maroone pants—brown shoes

6 McKinley Henderson 22 1417 - Ave I Ens. 6 ft 180 lbs Yellow knit shirt worn over yellow windbreaker—black pants—black shoes

Over

At 12 30 pm Sat Oct. 1—1966 when 6 negro males entered stage at line up, Mr. Reynolds stated that # 1 was one of his assailants on July 24—1966 Also # 3 was there "I saw another man there that resembled # 4 or 5. Show-up ended 12 47 pm

C. F. Reynolds

Sat. Oct 1—1966 12 47 p.m.

[fol. 94] V. T. Hart
Walter E. Ambrose—Warden
Sgt. Carl Limbaugh

Sat. Oct. 1—1966 12 15 am. Sgt CLL & VTH
met Caceyce Franklin Reynolds W M 20
2137 - Ivey Lane 822-6259

12 30 Sgt. C. L. Limbaugh—V. T. Hart
Walter E. Ambrose
1
2"

END OF EXHIBIT

Q Now, I will ask you whether or not he asked all of these individuals to make this statement before or after he identified Otis Stephens, or John Coleman?

A It was afterwards.

Q Afterwards?

A Yes, sir.

Q All right. And, then, was any statement made with reference to Otis Stephens and John Coleman by Mr. Reynolds?

A He stated that Coleman was there, No. 3, if I remember right, and what was the other part of that question?

Q What statement he made after—with respect to Otis Stephens and John Coleman?

A As well as I remember, that Otis Stephens was one of his assailants on July 24th, I believe it was, and No. 3, Coleman, was there. That is the reference he made to Coleman.

Q And this was stated after the request?
A Yes, sir.
Q And after it had been done?
[fol. 95] A Yes, sir.
Q All right. And I will ask you whether or not you advised John Coleman or Otis Stephens that they did not have to do that if they did not wish to?
A No, sir, I did not.
Q Now, I will ask you whether or not you advised them that if they did do it that it could be used against them?
A No, sir, I did not.
MR. TARTER: I think that's all of this witness.

CROSS EXAMINATION

Q (BY MR. MCDONALD:) Mr. Hart, I believe you said Mr. Reynolds identified both Otis Stephens and John Henry Coleman before he made the request of you to have them step forward?
A Yes, sir.
MR. MCDONALD: All right. That's all.

(Witness Excused)

MR. TARTER: Call Detective Fordham.
J. L. FORDHAM, called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * *

COURT OF APPEALS OF ALABAMA
THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

OCTOBER TERM, 1967-68

6 Div. 316

JOHN HENRY COLEMAN and OTIS STEPHENS

v.

STATE

Appeal from Jefferson Circuit Court

OPINION—April 23, 1968

JOHNSON, JUDGE

Appellants were indicted by the Grand Jury of Jefferson County, Alabama, for the offense of assault with intent to murder. After pleading not guilty, appellants were tried jointly by a jury, found guilty as charged, and sentenced to a term of twenty years in the State penitentiary. Following denials of their motions for a new trial, this appeal is made.

Casey Frank Reynolds testified for the State that at about 11:30 P. M. on July 24, 1966, he and his wife were travelling south on the Green Springs Highway when he had a flat time and pulled off onto the shoulder of the road at the top of the hill to repair it. Reynolds testified that as he was changing the tire, he noticed three people on the median of the highway running toward him; that previous to this time he had observed a car parked on the opposite side of the road headed North; that as the three people ran toward him he was shot once; that the men ran up to within three or four feet of him; and that one of the men who he identified as appellant Coleman, put his hand on his (the witness's) wife's shoulder. Reynolds stated that after a few seconds he observed lights from an approaching vehicle and that appellants turned as if to leave; that appellant Stephens turned and "pointed his arm" at the witness and fired a shot, after which all three

ran back across the road to the car which was parked there; and that they left the scene in the car. Reynolds stated on cross-examination that he later was called and asked to come to the city jail where he identified appellants as the men who assaulted him.

Robert Steele testified that he, the two appellants, and one John Hodge were together on the night of July 24, 1966; that they had been to the Sandy Ridge Club in Oxmoor; and that as the four of them were returning from the club appellant Stephens said, "We could catch a man walking the street and rob them," and that he (Steele) "told him I didn't think we had to do it."

Steele further stated that about middleways up the hill" on the Green Springs Highway, he began having car trouble and that he pulled the car onto the shoulder of the road where he got out, lifted the hood, and tried to get the motor running again; that while he was under the hood he heard some shots behind him; that he came from under the hood and shouted, "I'm fixing to go;" that he saw the other three men, including the appellants, on the other side of the street; and that there was a car parked on the other side. He further stated that he saw a white man and lady; that he saw appellant Stephens make "one shot after the man;" that the three men ran back to the car and got in; and that he (the witness) drove away from the scene.

Detective Hart testified for the defense that he was present at a line-up on October 1, 1966, at which time Casey Reynolds identified appellants; that there were six men in the line-up; and that all six men were required to say the words, "Let's take her in the woods", or something to that effect. Hart further testified that prior to the men saying these words, Reynolds had identified both appellants as his assailants.

Appellant Otis Stephens, testifying in his own behalf, said that he, John Hodge and Robert Steele were all together on the night of July 24, 1966; that Steele had been "drinking or taking pills;" and that as Steel was driving the car on the Green Springs Highway at about the top of the hill he ran onto the shoulder and that Hodge had to slam on the brakes to keep the car from going down

the shoulder. He then testified that Steele, upon seeing a car parked on the other side of the road, said he was going to rob them. Appellant Stephens then testified in part as follows:

"A. . . . I told him I wasn't going to have nothing to do with it, and me and him got to scuffling.

"Q. You and who?

"A. Me and Robert Steele, and John Hodge broke it up, and he pulled a pistol out and went over there.

"Q. Who did?

"A. Robert Steele.

"Q. Who went with him?

"A. John Hodge.

"Q. All right.

"A. And during the while they were over there, I was thinking about leaving, waiting on them.

"Q. Were you going down the hill, or up the hill?

"A. Down the hill.

"Q. All right.

"A. Towards town, and I got about two or three feet from the front end of the car and I heard a shot, and then I stopped and went over there, and about the time I got over there John Hodge was getting out of the car.

"Q. Getting out of what car?

"A. The woman's and the man's car.

"Q. All right.

"A. With a bag, and Robert Steele was standing over the man, with a pistol, and then he broke and run, and I met them in the center of the street, and I turned around and came back. Robert Steele shot again and then he jumped in the car, and drove it down the highway."

Stephens further stated that appellant Coleman was not with him on the night in question.

Appellant contends that the preliminary hearing of an accused in the State of Alabama is a stage of the criminal proceedings within the assistance of counsel guarantee of the Sixth Amendment.

In their respective briefs appellants' counsel state in part as follows:

> "It is the firm opinion and position of the Appellant's counsel that at any time after the investigative process has become accusatory and focalized upon the defendant that the defendant has without a doubt, guaranteed by the Constitution of the United States of America, the right to have counsel, either retained or appointed, present with him to protect those rights. . . . In fact, with effective cross-examination by competent counsel, the accused may very well be exonorated and thereby not even bound over to the Grand Jury. On the contrary, lack of effective cross-examination might well settle the accused's fate and reduce the trial itself to a mere formality."

The Supreme Court of the United States in *Pointer* v. *Texas*, 380 U. S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065, held that a transcript of a witness's testimony given at the preliminary hearing was inadmissible at the trial of the petitioner where the testimony "had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine." The Court further stated in part:

> "Under this Court's prior decisions, the Sixth Amendment's guarantee of confrontation and cross-examination was unquestionably denied petitioner in this case."

The Supreme Court declined to rule on the question as to whether or not the preliminary hearing was a critical stage of the proceedings requiring appointment of counsel. The court said in part:

> "In this Court we do not find it necessary to decide one aspect of the question petitioner raises, that is, whether failure to appoint counsel to represent him at the preliminary hearing unconstitutionally denied him the assistance of counsel within the meaning of Gideon v. Wainwright, supra. In making that argument petitioner relies mainly on White v. Maryland, 373 US 59, 10 L ed 2d 193, 83 S Ct 1050, in which

> this Court reversed a conviction based in part upon evidence that the defendant had pleaded guilty to the crime at a preliminary hearing where he was without counsel. Since the preliminary hearing there, as in Hamilton v. Alabama, 368 US 52, 7 L ed 2d 114, 82 S Ct 157, was one in which pleas to the charge could be made, we held in White as in Hamilton that a preliminary proceeding of that nature was so critical a stage in the prosecution that a defendant at that point was entitled to counsel. But the State informs us that at a Texas preliminary hearing, such as is involved here, pleas of guilty or not guilty are not accepted and that the judge decides only whether the accused should be bound over to the grand jury and if so whether he should be admitted to bail. Because of these significant differences in the procedures of the respective States, we cannot say that the White case is necessarily controlling as to the right to counsel. Whether there might be other circumstances making this Texas preliminary hearing so critical to the defendant as to call for appointment of counsel at that stage we need not decide on this record, and that question we reserve."

We are of the opinion that the differences in the procedures of the respective States as stated in the *Pointer* opinion, supra, are also present in the case at bar.

The purpose of preliminary hearing in Alabama is to determine whether an offense has been committed and if so whether there is probable cause for charging the defendant therewith. If there is probable cause to believe that the defendant is guilty thereof, then it is also the duty of the magistrate to fix bail if it is a bailable offense. Code of Alabama, 1940, Tit. 15, Secs. 139-140.

Thus, the subject matter of the preliminary hearing is temporary restraint of the accused person's liberty. Its purpose is not to convict; that is the trial court's function. Nor is it to procure evidence for conviction; that is the prosecution's duty. *Wood* v. *U. S.*, 128 F. 2d 265.

In extending the Sixth Amendment right to counsel guarantee to arraignment proceedings, the Supreme Court of the United States in *Hamilton* v. *Alabama*, 368 U. S.

52, said in part, "What happens there may affect the whole trial. Available defenses may be irretrievably lost, if not then asserted." See also *White* v. *Maryland*, 373 U. S. 59.

At the preliminary hearing, however, the accused is not required to advance any defenses, and failure to do so does not preclude him from availing himself of every defense he may have upon the trial of the case. Also *Pointer* v. *Texas*, supra, bars the admission of testimony given at a pre-trial proceeding where the accused did not have the benefit of cross-examination by and through counsel. Thus, nothing occurring at the preliminary hearing in absence of counsel can substantially prejudice the rights of the accused on trial.

We are not persuaded, therefore, that there are circumstances making the preliminary hearing so critical as to call for appointment of counsel.

Appellants also contend that their identification by Reynolds at the pre-trial line-up was so unnecessarily suggestive as to violate due process of law, and that it was thereby reversible error for the trial court to admit the in-court identification of the accused.

Appellants concede that the right to counsel at a pre-trial line-up is not applicable in this case. *Stovall* v. *Denno*, —— U. S. ——, 87 S. Ct. ——, 18 L. ed 2d 1199. However, appellants argue that the record reveals the injured party, Casey Frank Reynolds, was totally unable to identify his assailants prior to the line-up. Appellants base their contention on the fact that Reynolds testified that he told police officers that he did not think he would be able to identify his assailants.

The fact that an injured party tells law enforcement officials that he does not think he could identify his assailants should not preclude his making a subsequent identification, nor should such fact affect its admissibility into evidence.

Testimony from the record reveals that the line-up was not "so unnecessarily suggestive and conducive to irreparable mistake in identification that appellants were denied due process of law."

Reynolds testified in part as follows:

"Q. Have you been over to a line-up to observe these two defendants on any other dates, or any occasion, than the one time?

"A. No, sir.

"Q. Have you ever been inside any line-up room in any city jail at any time before that?

"A. No, sir.

"Q. That is the only time?

"A. Yes, sir.

"Q. Now, have you seen either Otis Stephens, or John Henry Coleman, handcuffed any time prior to then?

"A. No, sir.

"Q. Have you seen them behind any bars?

"A. No, sir.

"Q. Have you seen them in the hall of the City Jail, or anywhere else in custody?

"A. No, sir.

"Q. Had any detective said anything to you about either of these two defendants, that is, John Henry Coleman and Otis Stephens, about their identification, or suggest who they might be, before you went into the line-up room or any time?

"A. No, sir.

The preceding testimony indicates no improper suggestion by law enforcement officers in the witness's identification of appellants.

Testimony was also received to the effect that while the line-up was being conducted, appellants were required to say the words, "Get in the woods," or words to that effect. The Fifth Amendment privilege against self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . ." *Schmerber* v. *California*, 384 U.S. 758, 761.

In *Wade* v. *United States*, 358 F. 2d 557 (1966), the United States Court of Appeals stated in part as follows:

". . . [E]ach of the persons in the lineup was required to repeat words something like, 'Put the money in the bag' in order that the witnesses could hear

> similar words to compare with their recollection of the sound of the voice of the person who gave them such instructions at the time of the robbery."

On certiorari to the S. Ct. of the U. S., *U. S.* v. *Wade*, ——U.S. ——, 87 S. Ct. ——, 18 L. ed. 2d 1146, the Supreme Court stated in part as follows:

> ". . . [C]ompelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not, compulsion to utter statements of a 'testimonial' nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt. . . . We recognized that 'both federal and state courts have usually held that . . . [the privilege] offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a, stance, to walk, or to make a particular gesture.' Id., at 764. None of these activities becomes testimonial within the scope of the privilege because required of the accused in a pretrial lineup."

Compelling appellants to say the words spoken at the time of the assault in question for the purpose of identification was not compulsion to utter statements of a testimonial nature; they were required to use their voices as identifying physical characteristics, not to speak their guilt.

We are of the opinion that the line-up was properly conducted and that the appellants were not required to do or say anything that would incriminate them as a violation of their Fifth Amendment rights.

We conclude, therefore, that there was sufficient evidence bearing on the identity of the assailants from which the jury might find that appellants were the assaulting parties. *Gray* v. *State*, 38 Ala. App. 508, 88 So. 2d 798.

Having made a diligent search of the record and finding no error therein, we are of the opinion that the judgment in this cause is due to be and same is hereby

AFFIRMED.

CATES, J., concurring specially

After *Gilbert* v. *California*, 388 U. S. 263, this affirmance cannot apply as a precedent for trials after June 12, 1967. See *Stovall* v. *Denno*, 388 U. S. 293. Hence, I think this case falls under Code 1940, T. 13, § 66, so as to do away with the need for an opinion to explain the decision.

If there is any arguable point here, it would require the Supreme Court of Alabama to overrule *Aaron*, 271 Ala. 70, 122 So. 2d 360. Therein Lawson, J., wrote in part:

> "The writer and Justices STAKELY and COLEMAN are of the opinion that the testimony as to the identity of the defendant based on the enforced repetition by the defendant of words alleged to have been used at the scene of the crime was inadmissible and highly prejudicial. They entertain the view that such evidence violated the right guaranteed to the defendant by § 6 of the Constitution of this state not to be 'compelled to give evidence against himself,' for the conclusion of the prosecutrix of defendant's identity was based almost exclusively on this enforced conduct of the defendant. Beachem v. State, 144 Tex. Cr. R. 272, 162 S. W. 2d 706; State v. Taylor, 213 S. C. 330, 49 S. E. 2d 289, 16 A. L. R. 2d 1317. The Texas constitutional provision against self-incrimination is identical with that of this state. See 27 North Carolina Law Review 262; 24 Indiana Law Journal 587; 1 Vanderbilt Law Review 250.
>
> "The defendant was not merely required to speak; he was compelled to repeat certain specific words or phrases which the prosecutrix had told the officials her assailant used during the course of the attack. The South Carolina and Texas cases specifically condemn this practice. * * *"

However, in view of the emphasis exhibited by Merrill, J., in *Seals*, 271 Ala. 142, 122 So. 2d 513, I see no adoption of the South Carolina rule. Even though the use of the

same words[1] may be highly suggestible, Alabama seems uncommitted as to labeling the device as self-incriminatory.

Thus in *Aaron*, supra, we find at page 84:

> "However, LIVINGSTON, C. J., and SIMPSON, GOODWYN and MERRILL, JJ., are clear to the conlusion that the record in this case, when construed in the light most favorable to the defendant, does not show that he was 'compelled' to give evidence against himself. Consequently, they do not express any view concerning the right of the State to compel a prisoner to repeat in the presence of the prosecutrix certain specific words or phrases which the prosecutrix contends were uttered by her assailant."

Correctly, all the members of our Supreme Court kept the primary emphasis on compulsion vel non. The words which are used in a lineup are prejudicial only if the jury infers that the defendant is confessing.

In this connection, the contrast of voice identification with the reliability and objectivity of dactylography is denigrated by an excerpt from Weintraub, *Privilege against Self-Incrimination*, 10 Vand. L. Rev. 485, at 505:

> "Only compelled conduct which places reliance on the veracity of the accused and which may aid in convicting him of a crime for which he can be punished should be within the scope of the privilege. It would seem that a compelled voice test does meet this requirement. As is the case in the execution of handwriting exemplars, a direction to an accused to speak for identification purposes implies a command that he speak in his normal voice. When the accused speaks, he is making the statement, 'This is my voice.' Since, in practice, voice identifications are usually made by inexpert laymen, the suspect who disguises his voice has an even greater chance of defeating

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[1] In *Orr*, 225 Ala. 642, 144 So. 867, the words Orr used in jail are not set out in the opinion nor was compulsion shown. *S.* v. *Freeman*, 195 Kan. 561, 408 P. 2d 612.

identification than the suspect who attempts to disguise his handwriting."

Aaron was retried and came up again under the Automatic Appeal Act. 273 Ala. 337, 139 So. 2d 309. More detail as to the voice identification was adduced.

However, several reasons are listed to support the conclusion that Aaron was not compelled to testify against himself. One reason was that the victim identified Aaron before the deputy ("no threat, *coercion*, hope or promise of reward" being made to Aaron) asked Aaron to repeat the rapist's words, "turn me loose."

Thus the question appears still unresolved in Alabama.

In this case I fail to find in the appellant's brief any statement of testimony that at the line up at which Reynolds made the identification the police threatened or coerced any of the men into speaking. But see *United States* v. *Wade*, 388 U. S. 218, at 231, fn. 11, as a claim of prejudicial suggestiveness in *Aaron*, 273 Ala. 337, 139 So. 2d 309, supra.

United States v. *Wade*, supra, came from a divided court. A portion from Part I of the opinion of Brennan, J., was quoted herein by my Brother Johnson. The vote on Part I was 5-4.

In *Biggers* v. *State*, —— Tenn. ——, 411 S. W. 2d 696, we find:

> "In the instant case defendant was told what words to say and in repeating them he did not give any factual information tending to connect him with the crime; nor could any reliance be placed on these words which would indicate defendant was conscious of, or had knowledge of, any facts of the crime. The only thing he gave was the sound of his voice to be used, along with other things, solely for the purpose of identification. Under these circumstances we do not think defendant's constitutional right against self-incrimination was violated. * * *"

Thus I believe that a properly drawn instruction for the trial court to give the jury could direct the jury that the words employed are not confessory.

In this area of essentially police administration, safeguards against suggestibility are usually employed. I would adopt as the most comprehensive vademecum the following quotation (omitting citations and footnotes) from Traynor, C. J., in *People* v. *Ellis*, 65 Cal. 2d 529, 55 Cal. Rptr. 385, 421 P. 2d 393:

> "Defendant was arrested on September 9, 1964, and taken to the San Mateo Police Department, where the victim identified him in a lineup as her assailant. The victim also indicated that she could identify her assailant's voice. She was placed in a room next to the interrogation room, and defendant was asked to repeat phrases recited by the police. Defendant refused to cooperate and remained silent.
>
> "Police officers testified that they advised defendant of his right to counsel and of his right to remain silent and testified to his responses to their questions. They also testified that he refused to participate in the voice identification test. Defendant contends that introduction of the evidence of his refusal to participate in a voice identification test and the prosecutor's comments thereon violated his constitutional privilege against self-incrimination.
>
> "The privilege against self-incrimination applies to evidence of 'communications or testimony' of the accused, but not to 'real or physical' evidence derived from him. * * * The results of voice identification tests fall within the category of real or physical evidence. * * * In such a test, the speaker is asked, not to communicate ideas or knowledge of facts, but to engage in the physiological processes necessary to produce a series of articulated sounds, the verbal meanings of which are unimportant. The sounds alone are elicited for identification purposes through characteristics such as pitch, tone, intonation, accent, and word stress. The speech patterns of individuals are distinctive physical characteristics that serve to identify them just as do other physical characteristics such as color of eyes, hair, and skin, physical build and fingerprints.

"Voice identification testimony is the product of an observable physical characteristic made by an independent witness. It is the very type of objective factual evidence, independent of information communicated by the accused, that the privilege encourages police to seek. Moreover, independent identification testimony, unlike testimonial evidence derived from the accused, raises no question of reliance on the veracity of the accused. Any attempt by a suspect to disguise his voice is apt to be detected readily by those persons present who can compare the sample with his normal voice. Furthermore, there is no risk that one could be coerced into falsely accusing himself. It is difficult to imagine how a suspect could be induced to impersonate an unknown voice to incriminate himself.

"It has been urged that the privilege reflects an ultimate sense of fairness that prohibits the state from demanding assistance of any kind from an individual in penal proceedings taken against him. The privilege includes no such prohibition. Criminal proceedings are replete with instances where at least passive cooperation of an accused may be constitutionally required.

"A subject asked to speak for voice identification is not subjected to the same psychological pressures said to be generated by a demand for testimony. It is no more unfair to ask a suspect to speak for voice identification than to ask him to appear in a lineup for visual identification. The psychological pressures are reduced to the same degree, through a limitation of alternatives. Deceit is improbable; the simple choice for a guilty person is between conduct likely to expose incriminating evidence and inferences as to guilt likely to flow from a successful refusal to participate.

"A related view of the individual interest protected by the privilege focuses on the right of privacy. * * * The Fifth Amendment right of privacy protects at least uncommunicated thoughts and has been extend-

ed to preclude compelled production of private papers and documents. * * * A voice test, however, contemplates no such intrusion into privacy; no disclosure of thought or privately held information is requested. One's voice is hardly of a private nature. It is constantly exposed to public observation and is merely another identifying physical characteristic.

"It thus appears that an extension of the privilege to voice identification would serve none of the purposes of the privilege. It would only exclude evidence of considerable importance when visual identification is doubtful or impossible. The masked robber, the telephone extortionist, and the attacker in the night may all seek refuge behind an extension of the privilege that would do little to further the welfare of accused persons in general. Denial of access to a pertinent identifying trait can only weaken a system dedicated to the ascertainment of truth.

"We do not leave the individual unprotected. The need for protection is greater in confession cases where the risk of police overzealousness is comparatively great because self-incriminating statements are the most persuasive evidence of guilt. Testimony by a witness resulting from a purported identification is less conclusive and there is therefore less incentive for police to use unwarranted pressure in obtaining the evidence. Nevertheless, it bears emphasis that, as in the case of all police procedures for the securing of nonprivileged evidence, fundamental principles of fairness and due process are always applicable to prevent abuse. * * *

"Even though evidence obtained from a voice identification is not within the privilege against self-incrimination, the question remains whether evidence and comment on a refusal to take such a test is admissible. It is clear that 'it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation.' * * * This doctrine is a logical extension * * * of the rule of Griffin v. State of Cali-

fornia (1965) 380 U. S. 609, * * * prohibiting comment on the failure of an accused to testify at trial. Comment on refusal to testify was held to be 'a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.' * * * Such a rule is not applicable when, as in this case, the defendant has no constitutional right to refuse to speak solely for purposes of voice identification.

"Nor was defendant's refusal to 'display his voice' itself a testimonial communication. It was circumstantial evidence of consciousness of guilt, and like similar evidence, such as escape from custody (People v. Otis (1959) 174 Cal. App. 2d 119, 344 P. 2d 342), false alibi (People v. Allison (1966) 245 A. C. A. 590, 54 Cal. Rptr. 148), flight (People v. Hoyt (1942) 20 Cal. 2d 306, 125 P. 2d 29), suppression of evidence (People v. Burton (1961) 55 Cal. 2d 328, 11 Cal. Rptr. 65, 359 P. 2d 433), and failure to respond to accusatory statements when not in police custody * * * its admission does not violate the privilege. Moreover, as in the foreging examples, the evidence did not result from a situation contrived to produce conduct indicative of guilt. Unlike the superstitious tests described by Wigmore [3d. Ed. § 275] and their modern successor, the lie detector, that have as their sole purpose the establishment of an environment in which the accused's consciousness of guilt can be detected, the purpose of asking defendant to speak was to obtain probative physical evidence and the conduct was merely incident to that effort. A guilty party may prefer not to find himself in a situation where consciousness of guilt may be inferred from his conduct, but it can scarcely be contended that the police, who seek evidence from the test itself, will tend to coerce parties into refusing to take tests in order to produce this evidence.

"Although conduct indicating consciousness of guilt is often described as an 'admission by conduct, such nomenclature should not obscure the fact that guilty

conduct is not a testimonial statement of guilt. It is therefore not protected by the Fifth Amendment. By acting like a guilty person, a man does not testify to his guilt but merely exposes himself to the drawing of inferences from circumstantial evidence of his state of mind.

"We are aware that the United States Supreme Court in Schmerber v. State of California (1966) 384 U. S. 757, 765, fn. 9, * * * has cautioned that in some cases the administration of tests might result in 'testimonial products' proscribed by the privilege. We do not believe, however, that the inferences flowing from guilty conduct are such testimonial products. Rather, the court's concern seemed directed to insuring full protection of the testimonial privilege from even unintended coercive pressures. In the case of a blood test for example, the court considered the possibility that fear induced by the prospect of having the test administered might itself provide a coercive device to elicit incriminating statements. Such a compelled testimonial product would of course be inadmissible.

"Evidence of the refusal is not only probative; its admission operates to induce suspects to cooperate with law enforcement officials. Only the overriding interest in protecting the privilege against compulsory self-incrimination, itself the result of a delicate balance, prohibits evidence or comment in the refusal to testify cases. But the privilege itself is not at issue here. Without exception, none of the reasons that support the privilege lends support to a rule that would exclude probative evidence obtained from an accused's effort to conceal nonprivileged evidence.

"In the present case, however, the police officers warned defendant that he had the right to remain silent and that anything he said could be used against him. This warning did not distinguish between speech in terms of communications and speech for voice identification, between a refusal to speak free from sanctions and a refusal to speak productive of detrimental inferences. That distinction would hardly

occur to a layman unless it was called to his attention. Thus, defendant's refusal to speak might well have been the direct result of the police warning and cannot be used against him. * * *

"The usual Fifth Amendment warning that a suspect has a right to remain silent creates this problem, for if taken literally it includes the right not to speak at all. After having given such a warning, if the police direct a defendant to speak for voice identification and he refuses, they must, as a prerequisite to the use of the defendant's refusal to speak as evidence of consciousness of guilt, advises him that the right to remain silent does not include the right to refuse to participate in such a test."

See also Spectogram Voice Identification, 19 Am. Jur., Proof of Facts, 423.

I consider that nothing in *Gilbert* v. *California*, supra, detracts from the foregoing quoted views.

From the foregoing, I conclude that in trials after June 12, 1967, even with counsel attending a prisoner at a pretrial line up, after the defendant has been properly warned and advised both a la *Miranda* and per *Ellis*, his refusal to speak for voice identification is admissible as to guilty conduct on his part.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 867 Misc., October Term, 1968

JOHN HENRY COLEMAN and OTIS STEPHENS, PETITIONERS

v.

ALABAMA

On petition for writ of Certiorari to the Court of Appeals of the State of Alabama.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—March 24, 1969

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1192 and placed on the summary calendar.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 72

JOHN HENRY COLEMAN and OTIS STEPHENS,

Petitioners,

v.

STATE OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

BRIEF FOR THE PETITIONERS

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John Henry Coleman and
Otis Stephens

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SUBJECT INDEX

CITATIONS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1192

JOHN HENRY COLEMAN and OTIS STEPHENS,

Petitioners,

v.

STATE OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

BRIEF FOR THE PETITIONERS

Opinions Below

Petitioners found guilty of a felony, to-wit: assault with intent to murder, in the Circuit Court of the Tenth Judicial Circuit of Alabama and sentenced to twenty years on May 3, 1967. (A. 3, 11)* The opinion of the Court of Appeals of Alabama is reported in 211 So. 2d 917, April 23, 1968; rehearing denied May 21, 1968. Certiorari denied by Supreme Court of Alabama on June 20, 1968. 211 So. 2d 927.

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* (A. ___) Denotes Appendix; (R. ___) Denotes Record.

Jurisdiction.

Judgment of affirmance rendered by Court of Appeals of Alabama on April 23, 1968, rehearing denied May 21, 1968. Certiorari denied June 20, 1968. Petition for Writ of Certiorari filed in Supreme Court of the United States and docketed September 17, 1968. Jurisdiction of this Court is invoked under the provisions of Title 28, Section 1257(3), United States Code. Certiorari granted March 24, 1969.

Constitutional Provisions Involved

Constitution of the United States

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alabama Statutes Involved

Code of Alabama, 1940 (Recompiled 1958)

Title 15

Preliminary Examination

SECTION 133. EXAMINATION; HOW CONDUCTED. The magistrate before whom any person is brought, charged with a public offense, must, as soon as may be, examine the complainant and the witnesses for the prosecution on oath, in the presence of the defendant; and after the testimony for the prosecution is heard, the witnesses for the defendant must be sworn and examined.

SECTION 134. RIGHT OF DEFENDANT TO APPEAR BY COUNSEL; EXAMINATION; HOW CONDUCTED. The defendant may appear by counsel, and the magistrate may, on application, direct the witnesses for the prosecution or defense, or both, to be kept separate, so that they cannot hear the evidence, or converse with each other until examined; such examination is under the control of the magistrate, and should be so conducted as to elicit the facts of the case.

SECTION 135. TESTIMONY OF WITNESSES REDUCED TO WRITING AND SUBSCRIBED. The evidence of the witnesses examined, both for the state and for the defendant, must be reduced to writing by the magistrate, or under his direction, and signed by the witnesses respectively.

SECTION 136. TESTIMONY PRESERVED AND DELIVERED. The testimony, when taken as provided in section 135 of this title, must be carefully preserved by the magistrate, and must be delivered by him to the clerk of the court having jurisdiction of the cause, . . .

SECTION 138. ALL WITNESSES EXAMINED. It shall be the duty of the magistrate to examine all witnesses having any knowledge of any facts relevant to such investigation, whether such witnesses were summoned in behalf of the state or the defendant.

SECTION 139. WHEN DEFENDANT MUST BE DISCHARGED. If upon the whole evidence it appears to the magistrate that no offense has been committed, or that there is no probable cause for charging the defendant therewith, he must be discharged.

SECTION 140. IF PROBABLE CAUSE SHOWN, DISCHARGED ON BAIL, OR COMMITTED. If it appears that an offense has been committed, and that there is probable cause to believe that the defendant is guilty thereof, he must be discharged, if the offense is bailable, upon giving sufficient bail, but if sufficient bail is not given, or if the offense is not bailable, he must be committed to jail by an order in writing.

Questions Presented

1. Were the petitioners denied their constitutional rights, as guaranteed them by virtue of the Sixth Amendment and Fourteenth Amendment, by reason of their being denied the right to have counsel appointed to represent them at their preliminary hearing, where it was shown that petitioners were indigent and unable to employ counsel, were in possession of little or no formal education, no legal training and where testimony, vital to their defense, could have been elicited, transcribed and preserved for use in their defense; but which has been lost forever because of failure to have been represented by counsel?

2. Were the petitioners denied due process of law as guaranteed by the Fourteenth Amendment by reason of the pretrial lineup being conducted in such an unnecessarily suggestive manner as to be conducive to irreparable mistake in identification?

Statement of the Case

The petitioners were arrested in Birmingham, Jefferson County, Alabama on September 29, 1966. They were charged with Assault with Intent to Commit Murder, in that they "unlawfully and with malice aforethought, did assault Casey Frank Reynolds with the intent to murder him." (A. 1)

The assault occurred on July 24, 1966 at approximately 11:00 P.M. (A. 56) The victim, Casey Frank Reynolds, and his wife, Jeanette, were repairing a flat tire on their

car (R. 127), which was parked alongside Green Springs Highway in Birmingham (A. 56), when three males approached from a parked car across the highway. (R. 131) A shot was fired and Reynolds was struck. (R. 132) One of the assailants then stated "Get down into the woods." (R. 132) As a vehicle approached on the highway, the three assailants fled back to the parked car. (R. 134) As they fled one of the assailants turned, fired and struck Reynolds again. (R. 136) Reynolds was taken to a local hospital by a passerby. (R. 137)

Two or three days later, while in the hospital, Reynolds informed Sheriff's detective Fordham that he didn't believe he could identify his assailants. (R. 140) Reynolds told Fordham that all he could say was that they were black males, same age and same height. (A. 21) One of them wore a hat. Weeks later, after being released from the hospital, Reynolds viewed mug shots at the Sheriff's office and once again stated that he didn't think he could identify them. (A. 23, 24, 25) Mrs. Reynolds did not view the mug shots having already informed the detectives that she "definitely" could not identify the assailants. (A. 22)

On September 29, 1966, Reynolds was called by a sheriff's detective and requested to come to the City Jail. (A. 60) Reynolds said that he did not remember what the officer said; but "I took it for granted that they had the ones who shot me." (A. 60) At the lineup Reynolds viewed six black males only one of which, John Coleman, had a hat on. (A. 61, 62) Reynolds requested that the participants in the lineup step forward and repeat the words, "Get down into the woods." Only the petitioners who were among those in the lineup, were commanded by the officers to step forward and repeat the phrase. (A. 53, 61, 73,

75, 81) Detective Limbaugh said, "The audio portion of the intercom was distorted and he didn't believe it was fair." (A. 66) John Coleman was singled out by the officers to step forward and adjust his hat back and forward on his head. (A. 61, 62) Then and only then did Reynolds state that petitioners were two of the men who had assaulted them.

It is significant to note that between July, 1966 and October, 1966, banner headlines were exhibited in local newspapers telling of the assault and of the tremendous manhunt being conducted in an effort to locate the assailants. Local fund drives were initiated by civic groups to finance and subsidize the medical expenses of Reynolds, who was then a student.

On October 14, 1966, the petitioners were brought before the Honorable Robert W. Gwin, Judge of Jefferson County Criminal Court, for a preliminary hearing. (A. 7, 8, 15, 16) The petitioners appeared without counsel and were financially unable to employ counsel. Witnesses were examined by an Assistant District Attorney whose full time responsibility is to prosecute cases at preliminary hearings. The petitioners testified at the hearing. No witnesses were called on behalf of petitioners. No record or transcript was made of the proceedings by the Court. (A. 68-72) The petitioners were bound over to the Grand Jury and bond was set at ten thousand dollars ($10,000.00).

The Grand Jury indictment was returned on November 11, 1966. (A. 1, 9) Present counsel was appointed to represent the petitioners on November 18, 1966. (A. 2, 3, 10, 11) Petitioners were arraigned on December 1, 1966 and a plea of not guilty was entered. (A. 2, 3, 10, 11) A motion to suppress was filed by petitioners' counsel on January

30, 1967. (A. 7, 8, 15, 16) A hearing was held on February 24, 1967 on the motion. (A. 7, 8, 15, 16) The motion demanded the suppression of all statements and discovery evidence obtained by the State from the petitioners while testifying at the preliminary and prior to preliminary. (A. 7, 8, 15, 16) It moved for dismissal of the case for failure to provide counsel at the preliminary and at the lineup. Also, to suppress the identification made by Reynolds. Included were alleged confessions which were suppressed by the court; but, all other aspects of said motion were denied. (A. 7, 8, 15, 16)

During the course of the motion, testimony was taken as to circumstances under which the lineup was conducted; which has already been stated in this portion of the brief (*supra*). The court allowed proffered testimony which was offered by the defense pertaining to the question of whether or not the preliminary hearing is a "critical stage of proceedings in a criminal case in Alabama." This testimony was offered in the form of three lawyers, who in the trial court's opinion, "are qualified criminal lawyers practicing at the Bar with many years of experience". These lawyers would have testified that in their opinion the preliminary hearing is the "most" critical stage of proceedings in Alabama from the standpoint of the defense. (A. 68-72) Further it was shown that ninety-five percent of all cases in Jefferson County, that reach the grand jury, come by way of the preliminary hearing whether they are indicted or not indicted by the grand jury. Petitioners' motion was denied. (A. 68-72)

The petitioners were tried on May 1 and May 2, 1967. On May 2, 1967, they were convicted by the jury and the judge sentenced them to twenty years. Notice of appeal

given May 3, 1967. Motion for new trial overruled on June 29, 1967. (A. 2, 3, 10, 11) On April 23, 1968, Court of Appeals of Alabama affirmed the trial court. Rehearing denied May 21, 1968. Certiorari denied by Supreme Court of Alabama on June 20, 1968.

ARGUMENT I

Examine, briefly, this court's decisions relating to an accused's right to counsel at the various stages of criminal prosecution in light of the Sixth Amendment; and what this court has chosen to call "critical stages." The earliest possible stage is the *arrest* or more properly said, "when the light of suspicion begins to focus." What has this Court said? He is entitled to counsel, retained or appointed. *Escobedo* v. *Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977. The next stage which many times follows is the *lineup.* What has this Court said? He is entitled to counsel, retained or appointed. *Wade* v. *U. S.,* 87 U.S. 1926; *Stovall* v. *Denno,* 384 U.S. 1000, 16 L. Ed. 2d 1014. What of the *arraignment?* Yes! He is entitled to counsel, retained or appointed. *Hamilton* v. *Alabama,* 368 U.S. 52, 82 S. Ct. 157. Next the *trial.* Yes! Retained or appointed. *Gideon* v. *Wainwright,* 372 U.S. 335, 9 L. Ed. 2d 799. *Probation hearing.* Yes! v. , —— U.S. ——, —— S. Ct. ——, —— L. Ed. ——. *Appeal.* Yes! *Douglas* v. *California,* 372 U.S. 353, 83 S. Ct. 814. *Probation revocation.* Yes! *Mempa* v. *Rhay,* 88 Sup. Ct. 254.

The only stage omitted is the preliminary hearing, except in Maryland. *White* v. *Maryland,* 373 U.S. 59, 83 S. Ct. 1050. There the court said it was critical because a plea was required. It was determined to be "not critical" in

Pointer v. *Texas,* 380 U.S. 400, 855 S. Ct. 1065; because a plea was not required. However, this Court said, "whether there might be other circumstances making this Texas preliminary hearing so critical to the defendant as to call for appointment of counsel at that stage we need not decide on this record, and that question we reserve." It is the *question reserved* that we ask the Court to decide in this instant case. The statutes of the States of Texas and Alabama are substantially the same, but the reasons brought out and set forth are substantially larger than simply whether a plea is required or probable cause determined and bail set.

It is well founded and understood that had the petitioners been tried in the Federal Court, just a few blocks down the street, then they would have been entitled to counsel and would have received it had it been desired. *Ross* v. *Shica,* 380 F. 2d 577. Is it "equal and exact" justice for one to be entitled to counsel in one block while a few blocks down the street he is not? Is that "due process?" We think not.

Should one be doubtful, mind you only for a second, whether the preliminary hearing is a critical stage or not, ask one question. Have you ever heard of a rich man or a man with the ability to retain counsel appearing at a preliminary *without* counsel? The question answers itself. To provide counsel, as this Court has done in the other areas specifically enumerated is very much like affording a doctor for surgery, but none for the emergency room. Many trial advocates, such as the ones whose testimony was offered before the trial judge in this case, believe that the preliminary hearing is the *"most"* critical stage of proceedings. As a matter of fact, in oral argument before

the Court of Appeals of Alabama, the Assistant Attorney General admitted this stage to be critical. I understand he is no longer with the Attorney General's office.

Even though it may be said that a plea is not required or even allowable; it can still be said that an absolute plea in bar may be provable at the preliminary, not involving contradictory or variable facts, such as a Plea in Abatement (lack of jurisdiction) or the Statute of Limitations. Probable cause means more than the fact that a crime has been committed. It remains that it must have been committed within the jurisdiction of the Court and timely brought by the proper pleading, as well as many other elements. *DeGraffenried* v. *State,* 28 Ala. App. 291, 182 So. 482; *Phillips* v. *Morrow,* 210 Ala. 34, 97 So. 130; *Culligan* v. *State,* 29 Ala. App. 29, 191 So. 405. Alabama Code, Title 15, Sections 220, 221.

The reasons supporting the fact that the preliminary hearing is a critical stage of the proceedings are as follows:

1. It is the first opportunity the defendant has to be adequately informed by an allegedly impartial person, of that which he is charged.

2. The first opportunity to be confronted by those who will testify against him.

3. It is the first opportunity to examine those who will testify against him and have their testimony reduced to writing.

4. It is the first opportunity to subpoena persons to testify in his behalf.

5. It is his first opportunity to see the warrant which has incarcerated him.

6. It is his first opportunity to see pleadings of various kinds and nature which may appear.

7. He must elect to testify or not to testify, which also may be reduced to writing, and used against him at a later date; or may lead to State's discovery of evidence which would not have been found had defendant not testified.

8. He must elect to waive or not to waive his preliminary hearing.

9. He must decide what technical defenses are available to him and how to use them most effectively.

10. It is his first opportunity to be discharged on bail.

(a) In the event of a capital case, he must introduce evidence or argue to the magistrate under the existing evidence that the proof is not strong and the presumption is not great that he would receive the death penalty if convicted; therefore, he is entitled to bail.

(b) In the event of a non-capital case, he may introduce evidence mitigating the circumstances which would cause a reduction in the amount of bond and bring it within reach where otherwise it would have been out of reach.

11. It is his first opportunity to have the witnesses examined separate and apart from one another and to have their testimony limited to what is admissible.

12. It is his first opportunity to prevent the introduction of inculpatory statements illegally obtained,

which many times serves as the only foundation for determining probable cause.

13. It is a forum in which a record may be built and from which an effective defense may be engendered.

14. If a plea of insanity is contemplated, the court has the power to commit the defendant for a lunacy inquisition or psychiatrie examination rather than sitting in jail for months waiting for the trial court to do it.

15. It is a means by which the defendant can discover the evidence upon which the state intends to build a case.

16. It is imperative that counsel be appointed early in the proceedings before the witnesses become forgetful and the facts grow cold.

17. It affords an opportunity to effectively cross-examine or examine one's own witness and preserve his testimony for future use should said witness not be available at trial.

The Sixth Amendment clearly and unequivocally says "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." This Court has used this phrase time and time again to uphold the requirement of appointment of counsel. The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive

safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him. *Gideon* v. *Wainwright,* 372 U.S. 335, 9 L. Ed. 2d 799. One charged with a crime is as much entitled to assistance of counsel in preparing for trial as at the trial itself. The duty to appoint counsel is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. Even the intelligent and educated layman has small and sometimes no skill in the science of the law. He requires the guiding hand of counsel at every step in the proceeding against him. *Powell* v. *Alabama,* 278 U.S. 45, 77 L. Ed. 158, 55 S. Ct. 55. Certainly a person has a right to reasonable notice of a charge against him, an opportunity to be heard in his defense, a right to his day in court and these rights include as a minimum "the right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver,* 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682.

One has no way of knowing just how beneficial counsel would have been to petitioners at their preliminary hearing; since they were not afforded the right to counsel. Any definitive benefit would have to be pure speculation since none of us are clairvoyant. However, it is for the foregoing reasons set out upon these pages that it was an absolute necessity not only for these petitioners, but for all defendants. Since there is no way to correct the injustice done particularly by granting another preliminary hearing with counsel; we, therefore, urge this court to reverse and render said case.

ARGUMENT II

Petitioners concede that the lineup in question occurred before June 12, 1967 (A. 65), therefore, the holding of *U. S.* v. *Wade,* 87 U.S. 1926, pertaining to the right to counsel at a pretrial lineup does not apply. However, on the same day that *Wade, supra,* was decided this Court rendered another significant opinion. In *Stovall* v. *Denno,* 388 U.S. 293, 87 S. Ct. 1967, the court said that regardless of the fact that a lineup occurred before the date established for *Wade, supra,* and *Gilbert* v. *California,* 87 S. Ct. 1951, to apply prospectively, one is still entitled to relief in any event in a situation where the confrontation conducted was "so unnecessarily suggestive and conducive to irreparable mistake in identification that he was denied due process of law."

Petitioners are not asserting through this question that the lineup in and of itself is unjust. The court had adequately established in a multitude of cases including *Wade, supra, Gilbert, supra* and *Stovall, supra,* that a lineup does not violate an accused's privilege against self-incrimination. Petitioners also agree that to require certain acts to be performed during the lineup is in some cases constitutionally acceptable (i.e. putting on eyeglasses, *People* v. *Tomaszek,* 204 N.E. 2d 30; speaking in order to allow the identifier the opportunity to evaluate a voice, *U. S.* v. *Wade,* 87 U.S. 1926, giving of handwriting exemplars, *Gilbert* v. *California, supra*). The instant case does present additional facts which place it beyond the recognized constitutional lineup and into an area this court described in *Stovall, supra,* as suggestive and conducive to mistake in iden-

tification. It is because of these additional facts that the petitioners seek the relief of this court.

The petitioners interpret the *Stovall* v. *Denno*, 388 U.S. 293, 87 S. Ct. 1967, opinion by this court to mean that the defendant so claiming the unjust confrontation must bear the burden of proving that "the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistake in identification that he was denied due process of law." In view of the court's own standard as set out in the *Stovall, supra,* opinion, that of looking to "the totality of the circumstances" the petitioners assert that the condemning identification of the petitioners by the witness who for two months and seven days could not even describe his assailants (A. 23) was most surely a product of suggestive lineup methods. Petitioners contend the lineup was suggestive in that: (1) The police notified the witness in such a suggestive manner that in the witness's own words he "took this point for granted" when asked if the police told him they had the boys who shot him. (A. 60) (2) The petitioners and one other accused of committing this assault were the only participants in the lineup required to repeat the words used by the assailants on the night of the assault. (A. 53, 61, 73, 75, 81) (3) Petitioner, John Coleman, was the only person in the lineup required to wear a hat and was also required to move it about on his head. This was required in spite of the fact the police knew that one assailant had worn a hat. (A. 61, 62) It is asserted by the petitioners that such a suggestive lineup is certainly contrary to this court's notion of decency, fairness and fundamental justice and if so, it, of course, must be prohibited by the Constitution. *Rochin* v. *California*, 342 U.S. 165.

In *Palmer* v. *Peyton*, 359 F. 2d 199, the opinion says concerning any prior suggestions to persons who will be a witness, ". . . prior suggestions will have most fertile soil in which to grow to convictions. This is especially so when the identifier is presented with no alternative choice." Practicality must be observed in cases concerning suspects who are so unique, such as a one-armed, blue-eyed, red-headed albino Negro, that an alternative choice would not be possible. Here, however, it would have been very easy to have all six of the persons in the lineup to read or speak from some text not as suggestive as words used during the assault if a fair and just lineup were the true goals of the officers. It would have also been quite simple to either provide hats for all of the persons in the lineup or to have removed the petitioner's hat before presenting him to the witness as one alone in six with a hat similar to the witness's assailant. In *Pearson* v. *U. S.*, 389 F. 2d 684, the court said that the fairness of a pretrial lineup depends upon a number of factors such as the general age, racial, and other physical characteristics of the participants, including any body movements, gestures, or verbal statement that is required. In light of *Palmer* and *Pearson, supra,* where so much of what is considered as fairness is determined by the availability of an alternative choice how can petitioners' two man act in a cast of six be considered fair? By failing to require the other four men in the lineup to participate in the same or even a like manner as the petitioners, the officers surely provided the "fertile soil" where suggestion grows to conviction.

In *Crume* v. *Beto*, 383 F. 2d 36, the court said that evidence of identification resulting from a lineup, in order to be admissible, aside from right to counsel or privilege

against self-incrimination, recognized in *Stovall, supra,* must meet due process standards of fundamental fairness. Recognizing this principle set out in *Crume* v. *Beto, supra,* and first established in *Stovall, supra,* Medina, J. says in *Rutherford* v. *Deegan,* 4 Cr. L. Rep. 2350: "The inquiry in all these due process of law identification cases arising before Wade, supra, is simple, direct, and unequivocal: was the lineup or showup, without notice to or the presence of counsel, 'on the totality of circumstances surrounding' the confrontation 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification'? We proceed to apply this test to the facts of the case before us." The petitioners assert that when the facts of the present case are applied to the test set out in *Rutherford* v. *Deegan, supra,* the violation of due process will be clear. Looking to the "totality of the circumstances" the facts are: (1) The identifying witness could not describe his assailants except for color. (A. 21) (2) What little he did remember was completely different from the petitioners' actual appearance. (A. 88, 89) (3) The witness's wife who was at his side during the assault would not even attempt to identify anyone. (A. 22) (4) The witness told the police that he doubted that he could ever identify anyone. (A. 23, 24, 25) (5) The witness was called to the police station to view the lineup in such a way that he testified that "he took it for granted" the police had the man who shot him. (A. 60) (6) The witness could make no independent identification of anyone in spite of the fact he "took it for granted" his assailant was there. (7) Petitioners were the only ones called upon to do any specific act or make any gesture during the lineup.

Petitioners' counsel contends that taking into consideration the standard set out in *Stovall* v. *Denno, supra,* of determining each case by looking to the "totality of the circumstances surrounding it," the witness's identification of the petitioners in this case is clearly the product of impermissible suggestion and any identification arising out of such a lineup should not be admitted.

Counsel respectfully insists that the trial in this instant cause was a mere pretense after the state authorities had contrived a conviction resting solely upon the identification at the lineup as it was conducted in this instant case.

The due process clause of the Fourteenth Amendment requires that state action shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. This Honorable Court should not permit the petitioners to be hurried to conviction under mob domination, where the whole proceeding is but a mass, without supplying corrective process.

The facts and circumstances surrounding this lineup, while in custody and control of the law enforcement authorities, constitute such a violation of the accused's constitutional rights that the tainted identification at the trial of this cause should not have been admitted into evidence for consideration by the jury.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of Alabama should be reversed, with direction to dismiss the action.

Respectfully submitted,

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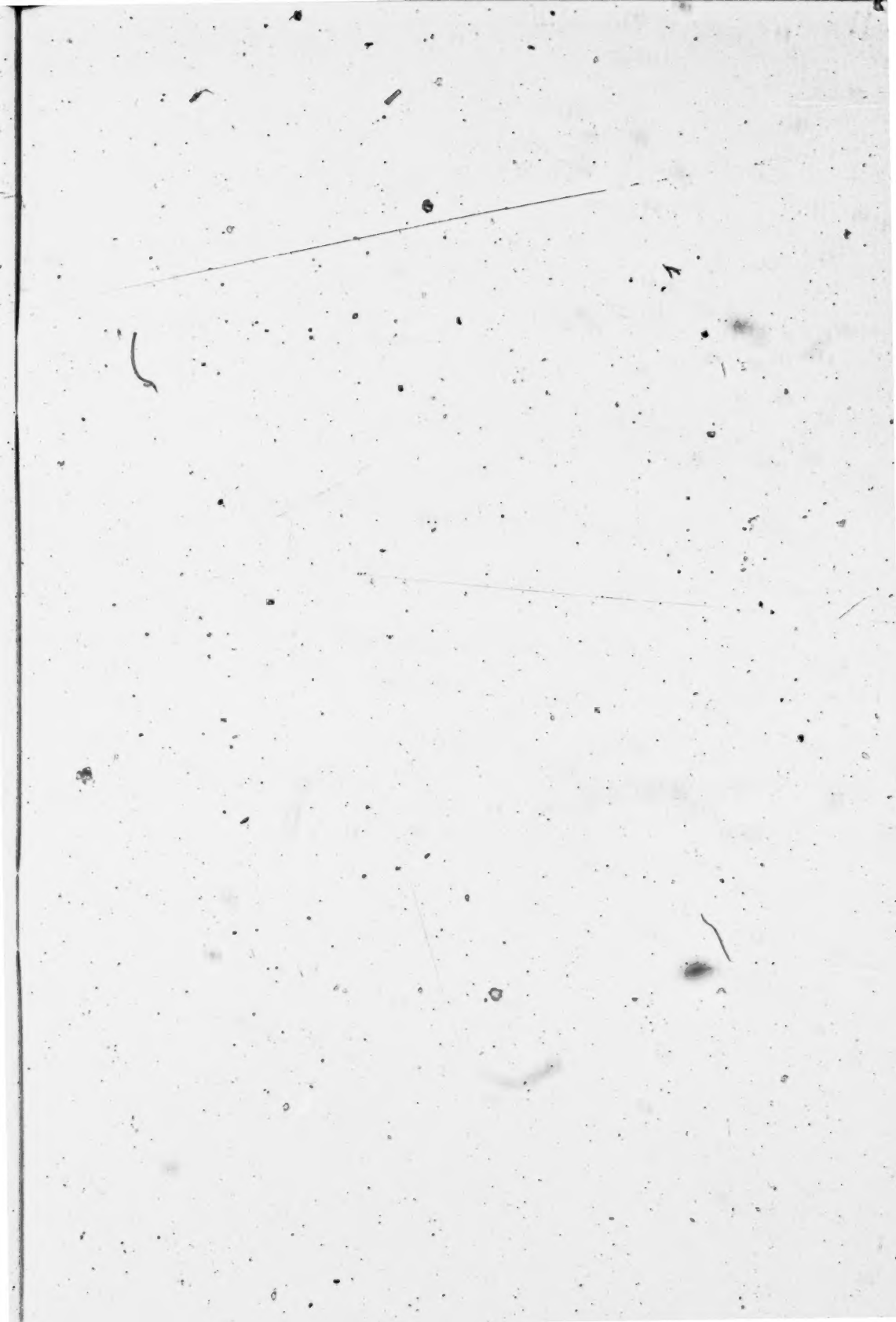
Birmingham, Alabama
Attorney for Petitioners,
John Henry Coleman and
Otis Stephens



In The

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

NO: [redacted] 72

JOHN HENRY COLEMAN
AND OTIS STEPHENS,

PETITIONERS

vs.

STATE OF ALABAMA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

BRIEF AND ARGUMENT OF RESPONDENT

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JOHN HENRY COLEMAN
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ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF ALABAMA

BRIEF AND ARGUMENT ON THE MERITS
BRIEF AND ARGUMENT OF RESPONDENT

I

OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals of Alabama is reported as follows:

John Henry Coleman and Otis Stephens v. State of Alabama, 211 So. 2d 917, April 23, 1968; rehearing denied May 21, 1968 (A. pp. 91-107).

Certiorari was denied by the Supreme Court of Alabama on June 20, 1968. 211 So. 2d 927.

Writ of Certiorari was granted by this Honorable Court on March 24, 1969 (A. p. 108).

II

JURISDICTION

The petitioners have been granted a writ of certiorari from the Supreme Court of the United States to review the judgment of the Court of Appeals of Alabama rendered on April 23, 1968, rehearing denied May 21, 1968. Certiorari denied June 20, 1968. Jurisdiction of this Court is invoked under the provisions of Title 28, Section 1257(3), United States Code.

III

QUESTIONS PRESENTED

1. Were petitioners denied their constitutional rights when preliminary hearing was had without their being represented by counsel?

2. Did the lineup violate Constitutional rights of petitioners?

IV

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

V

STATEMENT

Petitioners were indicted by the Grand Jury of Jefferson County, Alabama, for the offense of assault with intent to murder. Represented by counsel, they entered pleas of not guilty, were tried by a jury, found guilty as charged, and sentenced to a term of twenty years in the State Penitentiary.

Petitioners filed a motion to suppress confessions and statements arising out of lineup which was heard outside the presence of a jury and the testimony is on Appendix Pages 17-82, inclusive.

Evidence showed that Detective J. L. Fordham, Jr. testified that he talked to Mr. Casey Frank Reynolds at the hospital when the latter was in great pain and couldn't describe the assailants clearly; that witness did not believe Reynolds said whether he could identify them or not (A. 21); that Mrs. Reynolds stated she did not believe she could identify them (A. 22). Witness further stated that they were looking for three young, black males from Reynolds' description.

Casey Frank Reynlods testified that he had not seen either of defendants from the night of July 24, 1966, until he saw them in the lineup at City Jail on September 29, 1966

(A. 56); that he immediately recognized Otis Stephens as he stepped inside the door and he said "That man, there, is the one; he is the one that shot me." (A. 56); that he had not been over a lineup to observe these two defendants on other occasions nor had anyone said anything about these two defendants, or who they might be, before he viewed the lineup (A. 60); that he identified John Henry Coleman; that Coleman said nothing although he asked Mr. Limbaugh to have the men in the lineup say "Get in the woods" but he was told they couldn't do that (A. 58). Witness stated on cross-examination that the men in the lineup did not step forward and say "Get down in the woods." (A. 63); that John Henry Coleman had a hat pulled down over his eyes and he had Coleman move his hat (A. 61, 62); that witness had previously identified Coleman prior to his moving his hat (A. 62).

Carl Limbaugh stated none of the men in the lineup stepped forward and said "Get in the woods" or anything (A. 67).

All of the motion to suppress dealing with statements of either of the defendants and testimony that had been adduced from conversations had by Officers Fordham and Hart were confessed (A. 45).

At the trial, the following evidence was presented:

On October 14, 1966, preliminary was had when petitioners had no attorney (A. 7, 8, 15, 16). There is no indication from the record whether the preliminary was recorded, or whether requested by petitioners to be produced.

Casey Frank Reynolds identified Otis Stephens as the one who shot him twice as he was kneeling, changing a tire

(R. p. 136) and Coleman had his hand on Mrs. Reynolds (R. p. 134); that one of the three who came over made the statement "Get in the woods. Get in the woods. All we are going to do is fuck her." (R. p. 132). Coleman had a hat on (R. p. 151) and he saw his face (R. p. 153). Witness testified that Stephens was about six feet two, 175 pounds and about twenty (R. p. 162); that John Coleman did not say the words "Get down in the woods." (R. p. 171); that he saw the faces of John Coleman and Otis Stephens on the night of the shooting (R. pp. 171-172).

Robert Steele testified he was with the defendants and John Hodge on the night of July 24, 1966, driving John Coleman's car, a 1957 red and white Chevrolet (R. pp. 177, 178); that the car gave some trouble on Green Springs Highway and he stopped and lifted the hood and leaned over the fender with his back to the road (R. p. 181); that he heard some shots behind him and he came out from under the hood hollering "I am fixing to go." (R. pp. 182, 183); that the three passengers came running back to the car and he saw Otis Stephens shoot at the man; that the man and his wife were across the road (R. pp. 183, 184); that both Stephens and John Hodge had a gun and Hodge had a bag (R. p. 85); that he drove to John Coleman's house and then caught a bus home.

Detective Hart said Mr. Reynolds identified both defendants before he made the request to have them step forward (R. p. 218, A. p. 90).

VI

SUMMARY OF ARGUMENT

1. The preliminary hearing in Alabama is not so critical a stage in the prosecution that a defendant at that point

is entitled to counsel and the absence of counsel at the preliminary did not substantially affect the rights of accused on trial.

2. The pre-indictment, pretrial lineup, conducted on September 29, 1966, when petitioners were not represented by counsel, was not, on the totality of circumstances surrounding the confrontation, so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

VII

ARGUMENT

Petitioners, in their brief, strenuously argue that the preliminary hearing should be changed and classified as a "critical stage" of the proceedings and that a person charged with an offense is entitled to counsel as a matter of right at this stage. He cites *Escobedo v. Illinois*, 378 U. S. 478, 12 L. Ed. 2d 977, entitling accused to counsel at time of questioning when a confession is being sought, *Hamilton v. Alabama*, 368 U. S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114, entitling an indicted defendant to counsel at the critical stage of arraignment, where pleas to the charge may be made, etc.

Maryland has held the preliminary hearing to be a critical stage of the proceeding. In *White v. Maryland*, 373 U. S. 59, 83 S. Ct. 1050, 10 L. Ed. 2d 193, this Honorable Court reversed a conviction based in part upon evidence that defendant had pleaded guilty to the crime at a preliminary hearing where he was without counsel. This was based on the fact that pleas were made to the charge in Maryland.

An attempt to have the preliminary hearing in Texas declared a critical stage of the prosecution was disallowed in *Pointer v. Texas*, 380 U. S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923, wherein it was held:

> "... But the State informs us that at a Texas preliminary hearing, such as is involved here, pleas of guilty or not guilty are not accepted and that the judge decides only whether the accused should be bound over to the grand jury and if so whether he should be admitted to bail. Because of these significant differences in the procedures of the respective States, we cannot say that the White case is necessarily controlling as to the right to counsel. . . . "

One charged with an offense may request a preliminary hearing in Alabama. The procedures for preliminary examination in Alabama are set out in Title 15, Sections 133-140, Code of Alabama 1940.

The Court of Appeals of Alabama, in affirming the judgment of the lower court in this case, now before this Honorable Court, said:

> "We are of the opinion that the differences in the procedures of the respective states as stated in the Pointer opinion, supra, are also present in the case at bar.
>
> "The purpose of preliminary hearing in Alabama is to determine whether an offense has been committed and if so whether there is probable cause for charging the defendant therewith. If there is probable cause to believe that the defendant is guilty thereof, then it is also the duty of the magistrate to fix bail if it is a bailable

offense. Code of Alabama 1940, Tit. 15, Secs. 139-140.

"Thus, the subject matter of the preliminary hearing is temporary restraint of the accused person's liberty. Its purpose is not to convict; that is the trial court's function. Nor is it to procure evidence for conviction; that is the prosecution's duty. Wood v. U. S., 128 F. 2d 265."

Petitioners in their brief on page 12 admit that the statutes of Texas and Alabama are substantially the same.

The constitutional rights of accused are not violated in not giving him a preliminary hearing. *Grace v. State,* 220 So. 2d 259.

In spite of all the reasons conjured up by petitioners to support their contentions that the preliminary hearing is a critical part of the proceeding, it is used for determining the following:

(1) Whether an offense has been committed;
(2) Whether to hold or to release the defendant;
(3) To determine bail in appropriate cases.

Since the preliminary hearing in Alabama is not a "criminal prosecution" respondent respectfully submits that there is no violation of petitioner's rights under the Sixth Amendment.

Although petitioners concede that because the lineup occurred prior to June 12, 1967, the holding in *U. S. v. Wade,* 87 U. S. 1926, as to the right to counsel at pretrial lineup does not apply, *Stovall v. Denno,* 388 U. S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199, they argue that the confrontation was so unnecessarily suggestive and conducive to irreparable mis-

take in identification that they were denied due process of law.

The fairness of the pretrial lineup depends upon a number of factors such as the general age, race, physical characteristics of the participants, including any body movement, gesture, or verbal statement that is required. *Pearson v. United States,* 389 F. 2d 684.

Attention is directed to pages 88 and 89 of the Appendix. It will be noted that there were six Negroes in the lineup; that approximately three were of comparable description to each defendant. Stephens was six feet two inches tall, another man was six feet tall and another five feet eleven inches; that Coleman was five feet four and one-half inches tall, another was five feet seven and another five feet eight. Coleman wore a hat pulled over his eyes. *There is nothing in the record stating that he was required to wear that hat.* All he was required to do was move the hat so his face could be seen. Casey Frank Reynolds said he recognized Otis Stephens immediately as the one who shot him (A. 56) and that he identified Coleman before he moved his hat (A. 62) and that none in the line-up said "Get down in the woods" (A. 63).

At the trial Reynolds testified he saw the faces of the two defendants the night he was shot (R. pp. 171, 172).

The courtroom identification was predicated upon observations and knowledge gained by the witness independently of the lineup, making this case fall within a clearly defined exception to the rule announced in the Wade case. *State v. Allen,* 251 La. 237, 203 So. 2d 705

The comparison of the case with *Palmer v. Peyton,* 359 F. 2d 199, wherein the prosecuting witness was shown the

suspect's shirt and then identified his voice without comparing it to others is without merit.

In *Crume v. Beto,* 383 F. 2d 36, Crume was *required* to wear a hat while four others did not and having him be the only one to say "This is a stick-up" was not a denial of due process when so requested by the viewing witness, after an earlier identification.

Much of petitioner's argument deals with the fact that Reynolds could not from his hospital bed in pain give a description of his assailants accurate in every aspect.

Casey Frank Reynolds was changing a tire and was bent over when shot in the neck. Still dazed, he was shot again. Without citing cases but merely applying common sense, one can readily see that it would be difficult to describe these three but he did recognize two faces (R. pp. 171, 172) and he identified the defendants in the lineup. Prior to the lineup he had stated that he wasn't sure he could identify them (A. 25).

It is noted that in *U. S. v. Wade,* 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149, having men in the lineup say words uttered by the robber, put strip of tape on such as worn by the robbers did not violate their privilege against self-incrimination.

Respondent submits that there was no violation of defendants' rights in the conduct of the lineup; that Casey Frank Reynolds' in-court identification was based on identification at the scene of the crime, independent of the lineup; that the lineup was not, based on totality of circumstances, conducted in such an unnecessarily suggestive manner as to give rise to a very substantial likelihood of irreparable misidentification.

VIII

CONCLUSION

For the foregoing reasons, we submit that the petitioners were indicted, tried, convicted and sentenced properly and that the due process clause of the Fourteenth Amendment, the Fifth and Sixth Amendments to the Constitution of the United States were not violated in the trial of petitioners. Therefore, the case should be affirmed.

Respectfully submitted,

MacDonald Gallion

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Attorney General
State of Alabama

David W. Clark

DAVID W. CLARK
Assistant Attorney General
State of Alabama

Counsel for Respondent

CERTIFICATE OF SERVICE

I, David W. Clark, one of the attorneys for respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15 day of May, 1969, I served a copy of the foregoing brief and argument on writ of certiorari on one of the attorneys for petitioners, by mail-

ing a copy in a duly addressed envelope to said attorney of record, as follows:

To: Honorable Charles Tarter
Attorney at Law
1327 City Federal Building
Birmingham, Alabama

David W. Clark

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